EVERYDAY LAW

or

A Plain Statement of the Elemental Principles of Law Governing Ordinary Business :: :: Transactions :: ::

Prepared for Popular Use by
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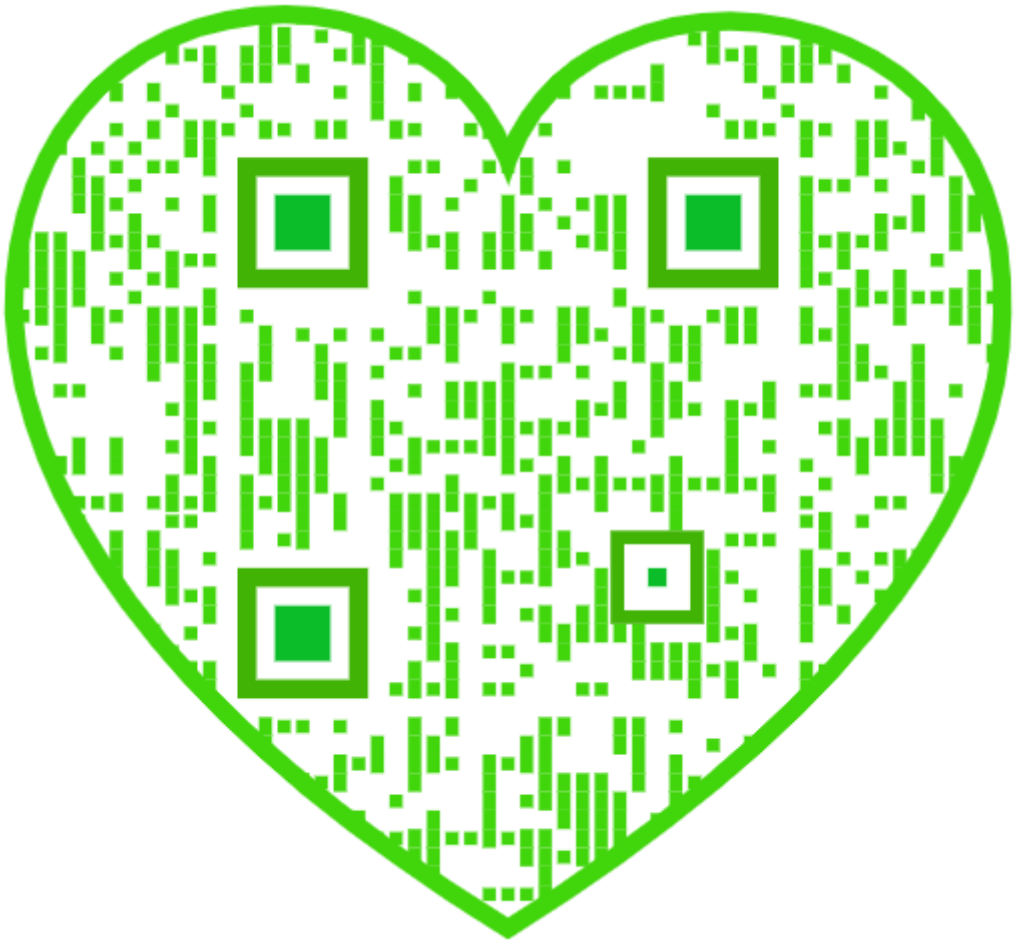

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PREFACE.

The author of this book has briefly, but accurately, stated the elemental principles of the law governing the usual and everyday business transactions in a way that any man or woman of ordinary intelligence can understand.

In view of the fact that the greatest and most comprehensive, yet condensed, summary of law ever published, "The Encyclopedia of Law and Procedure," is in forty large volumes and the fruit of the labors for many years of more than one hundred learned jurists, it cannot be expected that one small volume can answer all the questions that may arise, still it will be found indispensable to every man and woman and give them practical information of incalculable value. It does not attempt to state all the law, but tells enough to answer all ordinary purposes so far as every day people are concerned. It will tell them when a lawyer's advice is required and also how to act with independent judgment if necessary.

The subjects are treated in alphabetical order but a complete index is also added.

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EVERYDAY LAW

CHAPTER I.

WHAT LAW IS.

LAW may be said to be **a code of rules for the regulation of municipal and individual affairs.** As commonly used the word means **"jurisprudence,"** or the science of the laws prescribed by the state for the conduct of its citizens. In other words, briefly stated, it is **a general rule of external human action enforced by a sovereign political authority.** This authority may be exercised either by **acts of legislatures or Congress, or municipal assemblies,** or **the decisions of the courts,** all done under the powers conferred by a fundamental agreement called **"Constitution".** The legislature, or Congress, or municipal assembly, makes express and positive enactments commanding, or forbidding, certain acts, while **the courts construe and apply these legislative acts,** and in so doing, **in their opinions** in cases brought before them, also **lay down rules** which have the force of precedents and are followed and observed with almost equal fidelity.

Law is divided into "public" and "private". All rules which define and control the government of a country and the relations between it and its citizens come under the head of **public law,** while **private law** defines and controls the relations of one citizen with another.

The Constitution of the United States is the foundation of the laws of the nation and all state constitutions and acts of Congress and legislatures, and city or municipal assemblies, must not be in conflict with any of its provisions. So **a state con-**

stitution is the fundamental compact between its citizens and defines and controls all administration of justice and enactments of the legislature in such state.

There are two great systems of law, termed "common law" and "civil law". The latter is in force in Louisiana, and to some extent in other states, and is the old Roman law as modified by the code prepared under the direction of the great Napoleon and by legislative enactments. The **common law** may be said to be the customs and laws of England and acts of Parliament prior to about A. D. 1700 as construed by the English courts in their reported opinions. It is in force in most of the states and governs when not in conflict with the Constitution of the United States, the express enactments of Congress, or state legislatures, or state constitutional provisions. In a popular sense common law consists of the reported decisions of the courts of the land.

It will be seen, therefore, that **law consists of express enactments, or statutes, of the legislatures, or Congress, the ordinances of municipalities,** the **constitutions of the United States** and **the several states and the voluminous reported opinions of the courts,** all contained in thousands of huge volumes.

It is manifestly impossible for even lawyers to master this enormous mass of often conflicting and abstruse rules and precedents, much less the everyday business men and women, yet every person should have some knowledge of the law so that he may act with a fair degree of intelligence in the ordinary affairs of life. While he may not understand the meaning of the contents of the many law books which fill the shelves of successful lawyers, he should know what is meant by the usual agreements between business men, and the nature of associations, corporations and partnerships, he should know something about wills, administration and contracts. It is possible to acquire this knowledge in a general way, although experts must be consulted should the need for their assistance arise.

(See also the subject of Courts.)

CHAPTER II.

ADMINISTRATION.

THIS is a term applied to the **management of the estate of a deceased person,** by one appointed for that purpose by the proper court. When one dies leaving property, in order that such property may be collected, preserved and duly accounted for; that all just debts and the charges and expenses of burial and of the settlement of his estate, be paid and the remainder, if anything, be distributed to the parties entitled therto, it is usual for a special tribunal, variously styled in the different states probate, surrogate's, or orphans' court, to appoint an **administrator,** or, if there be a will, an **executor,** to administer and settle the estate and make proper distribution among those entitled thereto. The duty of administering the estate under the supervision of the court is conferred upon persons called the **"personal representatives"** of the deceased, who may be either executors or administrators. A man making a will is called the **"testator"**, a woman, **"testatrix"**, and if a person dies leaving no will he is said to die **"intestate"**. An **"executor"**, or if a woman **"executrix"**, is a person appointed by a testator to carry out the directions contained in his will and dispose of his property after his death in accordance with his wishes therein contained. An **"administrator"**, or if a woman **"administratrix"**, is a person appointed by the court to settle the estate of one who dies intestate.

Formerly an executor or administrator, had only to do with the personal property of the deceased, but in modern times all the property left by a deceased person is subject to the jurisdiction of the court and to the payment of debts if required for that purpose.

Administration involves everything that may rightfully be done in the preservation of the assets of an estate, and the dealings of the executor or administrator with creditors, legatees, devisees or heirs. The jurisdiction and functions of the various courts of probate is prescribed by statute and the procedure is different in different states, so that it is necessary to con-

sult local legal counsel in order to make sure that the proper procedure is followed.

Administration is generally necessary where unpaid debts are left by the deceased, but as a general rule the heirs may, where there are no debts, divide the property in any manner agreed upon by them except in states by the laws of which an inheritance or succession tax is required to be paid after an appraisal of the estate. In such states regular administration of the estate must be had and cannot be dispensed with by agreement of the heirs.

Administration is necessary upon the estate of an infant, although he cannot make a will, but in many states administration is not necessary upon the estate of an adult who has left no debts but the heirs can make partition by mutual agreement.

Administration should be had in the place where the deceased resided at the time of his death. If there is property situated in different states it is usual to probate the will at the place where the deceased lived and then to record a certified copy of the will and its "probate", or procedure by which it is established or proved, in the different places where the deceased had property, or in such other states take out additional or what is termed "auxiliary administration." In case one dies away from home, it is not customary for any administration to be had in the place of death unless the law of the state requires an officer, known as a **"public administrator",** to take charge of the personal property the deceased may have had in his possession at the time of his death. A court cannot grant administration upon the estate of a non-resident who has left no property within its jurisdiction.

If the deceased has left a will, the person appointed by the will to execute it, is called an **"executor,"** or **"executrix,"** and if he accepts and duly qualifies, he alone is entitled to receive from the proper court what are called **"letters testamentary,"** that is written authority from the court to administer the estate, to which certificate is attached a copy of the will. If the deceased left no will, then the court appoints a suitable

person who is called an **"administrator,"** or **administratrix."** to administer under its direction the estate. In most of the states the **nearest of kin to the deceased is entitled to be appointed** administrator, but in some a **married woman is disqualified** from acting as "administratrix" and some other person possessing the proper qualifications must be appointed. As a general rule **any person who is capable of making a will may be an executor,** and unless forbidden by statute, a married woman may with the consent of her husband be an executrix and so may an infant, but state laws often disqualify both married women and infants and generally disqualify a nonresident. Idiots and lunatics are incapable of becoming executors or administrators. A person nominated as executor cannot be compelled to act, but may refuse to accept the appointment.

If a will makes no appointment of an executor, one is appointed to execute the will called an **"administrator with the will annexed."** If there is no will then the proper court appoints an administrator. There may be one or more executors or administrators, and if there is more than one, they must all act jointly.

Sometimes after an estate has been fully settled and other property not before distributed is found, it becomes necessary to appoint what is called an **"administrator de bonis non,"** that is an administrator of the property which was not previously administered upon and disposed of.

It is always necessary to observe in administration the formalities prescribed by the law of the place where the deceased died, or where the property is situated, and hence an attorney should be consulted, although in many states the probate judge will make suggestions in order to enable the persons interested to avoid expense of counsel.

If the will provides that the executor shall be **without bond,** it is not necessary for him to give security, but an administrator is always required to give bond for the faithful performance of his duties and his commission, or letters of administration, will not be issued until he has given the required bond. Even though the will provides that the executor shall

not be required to give bond, creditors may, upon proper showing to the court, obtain an order requiring the executor to furnish bond.

All the property of a deceased person is held liable for his debts, and the expenses of the last sickness and burial. As a general rule, personal property is first applied to the payment of debts and if sufficient the real estate will not be resorted to, but if necessary the real estate belonging to the deceased may be sold under the direction of the court. Property which the deceased held in a trust capacity does not constitute assets of his estate, but will be taken charge of by a successor in the trust, and if the deceased had only a life estate, the property will go to the person entitled to the remainder, that is to take the property after the life tenant dies.

When an executor or administrator has given bond and received his credentials, he should **publish notice of his appointment,** if required by local law, and make **an inventory** of all property belonging to or claimed by the deceased, except property held in trust, and have the **personal property appraised** if the statute requires it, and thereafter file a **supplemental inventory** for any additional property that may come to his knowledge. In some states it is not necessary under certain conditions to file any inventory. It is also the duty of an executor or administrator to attend to the **decent burial of the deceased** and the reasonable expense of such burial will always be allowed. In some states an administrator cannot collect rents unless ordered to do so by the proper court.

An executor or administrator is required to use reasonable diligence and exercise such prudence, care and judgment in attending to his duties, as an ordinarily prudent and skillful man would use in regard to his own property. It is also necessary for him to keep a **separate account of receipts and expenditures** and deposit the money of the estate in a separate account, or invest it under the direction of the court. He is not justified in engaging in trade with the funds of the estate or to use the funds of the estate in speculation or a hazardous undertaking, although he may continue the business

of the deceased for a reasonable time under the direction of the court. An executor must follow the directions of the will so as to carry out the wishes of the deceased.

Where the deceased was a partner, it is the general rule that the **surviving partner has the right to administer the estate.**

An executor or administrator is authorized to employ legal counsel and should obtain the authority of the court in all matters concerning which his duty may be in doubt.

Sales of personal or real estate are usually regulated by statute and these statutory directions should be carefully followed. An executor or administrator cannot lawfully make any personal profit out of the estate of the deceased, but must account for all profits made by him.

The presentation, allowance and payment of claims is regulated by statute and the general rule is that an executor or administrator should pay no claims except under the authority of the court, especially when the estate may prove insolvent. Usually **claims against an estate are divided into classes,** the first is entitled to priority in payment and embraces the expenses of the last sickness and burial of deceased, next come taxes and debts due the government, next claims reduced to judgment, and after that such other claims as may be allowed by the court, or commissioners appointed for the purpose. It is doubtful whether an executor or administrator has authority to pay for a monument, or tombstone, without the authority of the court. If the estate is insolvent, certain claims are entitled to priority, among which are payments to the widow and minor children which are allowances given by law by way of dower or provision for temporary support and, after payment of the preferred claims, the balance is distributed pro rata among the creditors whose claims have been allowed.

After payment of debts, it is the duty of the executor, or administrator to **present his final accounts,** give such notice as required by law and make distribution of the estate to those entitled thereto under the direction of the court. Care should be taken to make no payment either of legacies or debts without the sanction of the court, in order to avoid personal lia-

bility in case the assets of the estate prove insufficient. Generally the **compensation** of an executor, or administrator, is regulated by law.

[For further information see the subject of Wills.]

CHAPTER III.

AGENCY.

AGENCY is the relation that exists where one party called the "principal," authorizes another, called an "agent," to act for him in dealings with third parties. Anyone who can do an act himself may be a principal and perform such act by an agent, except where there is a personal confidence reposed in him which requires such person to the act himself, as where the employment involves personal trust and confidence, in which case the party cannot appoint an agent to do it for him, or, if he is an agent himself, appoint a sub-agent. As for example, if a person has authority to sell property and make a deed, or where one is a broker, he cannot authorize another to sign a contract in behalf of his principal. No person can authorize another to do an unlawful act or to do something forbidden by law. The capacity to act as agent generally depends upon the capacity in the principal to do the act himself.

Neither idiots nor lunatics can appoint an agent, but a **minor can appoint an agent** to act in matters concerning which he can act, as for example, to purchase necessaries, such as clothing, or arrange for board or schooling, but all such acts are subject to scrutiny to avoid imposition on the minor. **Married women in most states are capable of appointing agents.**

Anyone who can act for himself may act as agent and even a minor can be appointed agent and do acts for another which he would not have capacity to do for himself.

Agents may be either "general", that is having authority to act in all matters for their principal, or "special", that is having a limited authority. A principal is bound by all acts within the apparent authority of the agent; that is if a man holds out to the world another as having authority to do certain acts in such a manner as to convey to the world a reasonable inference of the agent's authority, the principal is bound by all the acts done within the apparent scope of his authority.

Again agents may be **"express,"** that is appointed, either verbally or in writing, in express terms, or **"implied"**, as where

from the conduct of the parties there is an implied authority on the part of the agent to do an act. An agent may appoint one to act for him who is called a **sub-agent,** that is an agent for an agent. The latter derives his authority directly from the principal and the sub-agent derives his authority from the agent who has been appointed by the principal.

Agency can only exist by the will of the principal and with the consent of the agent, and hence it is always necessary that the principal shall in some manner, either expressly, or by inference from conduct for which he is responsible, appoint the agent and that this agency shall be accepted by the agent.

There is no particular way in which an agent must be appointed, although in some cases the appointment must be in writing, as where authority is given to sell or convey real estate, sign checks, endorse notes or to act in some matter of that kind.

Sometimes an agent is appointed by a writing called a **power of attorney** and where written authority is required by law, as to execute a deed or to make or endorse notes, the agency can only be created by such instrument in writing. Sometimes, as in the conveyances of real estate, the power of attorney must be acknowledged and recorded the same as a deed, so that the authority for the act may be on record.

A person may do an act for another without authority, and this **unauthorized act may be afterwards ratified by the principal,** in which case the result is the same as if authority were originally given. If an act done, or a contract entered into, by an agent without authority is illegal and void it cannot be ratified, but acts which are merely voidable can be ratified. **"Void"** means something which is without effect: **"voidable"** means something that can at the option of a party be set aside. Any person may ratify an unauthorized act of another in his behalf if he could originally have given authority to do the act or if he still has power to do it at the time of the ratification. **Sometimes ratification will be implied,** as where the principal has accepted the beneficial results of the act of the unauthorized agent.

If an agent is appointed to do some particular act, when

this act is performed the **agency is terminated** by that fact. An agent also may be appointed for a specified period, after which the agency ceases.

The agent's authority may be revoked at any time unless such agent has an interest in the matter entrusted to him, as for example, when property is pledged and the agent is authorized to sell the property in case the conditions of the pledge be not performed, or if he has some pecuniary interest in the subject matter of the agency, as a commission, in such cases the agency cannot be revoked, but continues until the act is performed, if required, or the object of the agency is accomplished. If an **agency is created for a consideration, it cannot be revoked** by the principal unless the authority for such revocation is reserved. For example, if authority is given an agent to sell certain property and pay over the proceeds to another party. The **death of the principal constitutes a revocation of the agency,** and as does, in some cases, his insanity. As a rule the **revocation of an agency must be communicated** not only to the agent, but also in some way to the public so that persons will not be led to deal with him not knowing that his authority has been revoked. The agent can abandon his agency or renounce it. When a partnership is dissolved, it works a revocation of the authority of an agent of a firm.

Every person who deals with an agent is bound to inquire as to his authority and deals with him at his peril. This rule is modified to the extent that acts done within the apparent scope of the authority of the agent are binding upon the principal. For instance, the principal will not be bound by acts in excess of the agent's authority if the facts and circumstances of the case are such as to put persons dealing with the agent upon inquiry as to his authority. If an agent has authority to do an act and in doing it violates **secret instructions,** the principal will still be bound, if the authority was general enough so as to give the party dealing with him reason to believe that such agent was acting within his authority.

An agent has authority to do **all such acts as are reasonably necessary** for the transaction of the business in question, for

example, the customs and usages in the trade or business in which the agent is engaged form part of his authority and such customs and usages are presumed to have been known to his principal.

Where the authority is given by a writing, the power of the agent is confined to the limits marked out by such writing, and parties dealing with an agent must inform themselves of the extent of his authority.

An agent is bound to act in entire good faith and loyalty to his principal and if he fails to do so, he will be liable for any loss which results. An agent must not, except with his principal's consent, enter into any transaction relating to the subject-matter of his agency in which he represents adverse or hostile interests, nor must he engage in any business on his own account of the same character as that of the principal in opposition thereto. **He cannot deal with the subject matter of the agency so as to make a secret profit, but must account for all profits made out of the business of the agency.** In all dealings with his principal on his own account the agent must act with entire good faith and make a full and fair disclosure of all the facts relating to the transaction. He **cannot act for an adverse party and his principal at the same time**, but can, as the Scripture says, only serve one master. He must **obey instructions** and is liable to his principal for any loss or damage resulting from a violation of instructions, although there may be cases of necessity arising from a sudden emergency, such as not only to justify, but require a departure from the strict letter of his instructions. If the agent under such circumstances acts as an ordinarily careful man would do he will not be liable. An agent must exercise such diligence and care as an ordinarily prudent man would exercise in the performance of his own business.

Although the agent acts without compensation, he is still liable for negligence in the performance of such business, or for breach of duty toward his principal.

The principal is bound to give his agent opportunity and

all necessary facilities for transacting the business entrusted to him and the agent has a right to compensation.

An agent is **personally liable** to third parties with whom he deals if he violates his instructions or makes an unauthorized contract, or if he is guilty of fraud or any other act whereby, because of his negligence or wrong, the principal is not bound by his act.

In dealing with **corporations** it must be remembered that all officers of associations or corporations are agents and persons dealing with the agents, or officers of a corporation are bound to take notice of its charter. A corporation cannot be bound by acts in excess of the powers conferred upon it by the charter. Ordinarily a person dealing with a corporation is not bound to take notice of the limitations contained in the by-laws.

An agent, in **signing any note, or contract, for his principal,** should be careful to sign the name of the principal first and then add his own name prefixed with the word "by", or "per". For example, if John Smith executes a contract or note for Peter Jones, he should sign it, "Peter Jones by John Smith agent", and not "John Smith, agent for Peter Jones." In the latter case he might be held personally liable because the words, "agent for Peter Jones" would be only words descriptive of who John Smith is.

Power of Attorney

A **"power of attorney"** is a formal writing executed by a person authorizing an agent to do some act. It may be in the following form, due care being taken to make the authority definite and certain.

I, John Smith of the City of Detroit, Michigan, hereby appoint Henry Doe of the City and State of New York my true and lawful attorney for me and in my name and with all the power I might exercise if personally present,

x to sign checks on the First National Bank of Detroit, Michigan.

x to execute in my name any and all promissory notes for such amounts and for such length of time and rate of interest as he may deem best.

x to collect any and all debts due me from any and all persons and give proper receipts therefor.

x to collect, compromise or adjust any and all claims I may have against the Jones Manufacturing Company of New York, execute a proper release thereof and endorse and collect any check or draft received in payment thereof.

x to sell any and all real estate I may have in the State of New York and execute a warranty deed therefor in the usual and customary form.

(Insert the desired one of the above specifications marked * which is desired, or name any other act which is to be done by the agent then conclude;)

Hereby ratifying and confirming all that my said attorney may do by virtue of the premises.

I hereby authorize said attorney to substitute by writing signed by him any other suitable person to perform the acts herein specified.

In Witness Whereof, I have hereunto set my hand and seal this 10th day of June, 1913.

John Smith (Seal)

Generally a power of attorney should be acknowledged before a Notary Public or clerk of a court in the following form:

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.

On this 10th day of June, 1913, before me, the undersigned a Notary Public in and for said county, personally came John Smith, to me known to be the same person named in and who executed the foregoing instrument as party thereto and acknowledged the same to be his free act and deed for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal on the day and year first above written. My term of office expires June 10, 1916.

Henry Doe,
Notary Public.

CHAPTER IV.

ARBITRATION.

THE law favors the settlement of disputes out of court and hence two or more persons having a disagreement may submit the controversy to the judgment of one or more persons of their choice who act as judges and are called **"arbitrators."** In most states the law provides for the submission of disputes to arbitration, and that, when the decision of the arbitrators is made, it may be filed in court and a judgment entered thereon. Men may agree to leave a dispute to arbitrators either by written or verbal agreement, but **all agreements to submit a controversy to arbitration are subject to revocation** and no executory agreement to submit a matter to arbitration can be enforced. An apparent exception to this rule is the provision in **fire insurance policies,** that in case of loss the amount of loss shall be determined, in case of disagreement, by **appraisers,** and no suit shall be brought until the amount of the loss is settled by appraisers. This is what is called a condition precedent to bringing suit and is binding. The appraisers arbitrate the question as to the amount of the loss.

In all other matters at any time before hearing of the arbitrators is begun, a party may back out, but he may be **liable for damages** for so doing. The provision of the statutes is generally that the persons selected as arbitrators shall **take an oath** that they will perform their duties faithfully and impartially and **give notice** to the parties interested, **of their appointment and time and place of hearing the evidence presented** and when they have agreed upon their finding the same shall be filed in the proper court.

Arbitrators are bound to be fair and impartial and to only listen to such evidence as may be produced openly by the parties in the presence of each other.

The usual course pursued under an agreement for arbitration is for each party to select an arbitrator, and in case the two cannot agree they select a third arbitrator, called the **"umpire,"** and his decision determines the finding which is called an **"award".**

CHAPTER V.

ASSOCIATIONS.

ANY number of persons may associate together for a particular purpose not unlawful; such **association** may receive a charter from the state in which case it becomes a **corporation,** or it may remain unincorporated and then it is called a **"voluntary association".**

Churches, lodges and clubs are generally **voluntary associations** and their **articles of association, or the agreement to which all members organizing it subscribe,** and those afterwards joining it subscribe when they become such, regulates the admission of new members, defines their qualifications and specifies in what manner and for what causes membership may be terminated and the objects for which such association is formed and the manner in which such objects are to be accomplished or the business, or undertaking, carried on.

The **Courts** will not interfere with the proceedings of these association, or restore a member who has been expelled, unless some **property right is involved.** If no property right is involved a member may be expelled in any way and he has no remedy. The **rights of the members** and their relations to each other are determined or governed by the **articles of association,** which may be called a **constitution,** and the **by-laws;** so far as the responsibility of the members to each other is concerned, **the members will not generally be partners;** yet, while a voluntary association is not strictly speaking a partnership, the **members may be deemed partners** so far as the obligations of the association to outsiders are concerned and become personally liable. This liability is based upon the law of agency; for example, if a member of a club buys articles for the use of the club, it is presumed that he was the agent of the members for that purpose and all are liable, or at least all who participated in voting for the purchase.

The **meetings of an association** are governed by the constitution, or articles of agreement, of the society. Special meetings may be held if a notice is given stating the purpose of the meeting, but no business can be transacted at such meeting

except that mentioned in the call. If the constitution is silent as to the number of members who constitute a quorum, the acts of any number of members assembled in response to a regular call, or at the meeting required to be held by the terms of the constitution, are valid, but if the constitution prescribes the number of members requisite to form a **quorum,** that number must be present at the meeting in order to transact business. A fundamental rule, applicable to all associations, partnerships and corporations, is that within the express or implied terms of the articles of association or constitution, or agreement of the members, the **majority has power to bind the entire membership,** but the majority, in order to bind the minority, must comply with every formality prescribed by the company's or association's charter or articles of association for the transaction of business and is bound to exercise the utmost **fairness and good faith** to the minority and action must be taken at a properly called meeting, notice of which must be given if required by the by-laws.

(For information as to incorporated bodies or associations see the subject of Corporations.)

CHAPTER VI.

BAILMENT.

WHEN a person delivers personal property to another on depposit, or for some particular purpose upon an express or implied contract that after that purpose has been accomplished the property will be returned to the person who delivered it, or disposed of as he may have directed, the act is called a "bailment". For example, the owner may take a watch to be repaired, or a livery stable keeper may let out a horse, or a man may take materials to be made up into some article, as cloth for a suit of clothes; or he may deliver goods to a warehouse keeper to be kept for him, or he may deliver goods to a common carrier to be transported, or he may send goods to a commission house to be sold on his account. A transaction of this kind is in law a **"bailment,"** and the person who delivers the goods is called the **"bailor"** and the person who receives them is called the **"bailee."**

The **contract of a bailee is sometimes express,** as where a warehouse man receives property to be stored and gives a warehouse receipt for it; or a common carrier receives articles to be transported from one place to another, in which case a receipt is usually delivered by the bailee to the bailor, such as a bill of lading; or the **contract may be implied, or inferred from the circumstances,** as where a man borrows some article that he will return it, or hires a horse that he will use it carefully, or where an article is pledged for a loan, as when a watch is pawned with a pawnbroker or stocks or bonds pledged to a bank for a loan, that when the loan is paid they will be returned.

The law divides bailments into three kinds; first where the bailment is for the **benefit of the bailor,** or some person whom he represents, as when a man deposits any kind of personal property with someone for safekeeping; second, those for the **benefit of the bailee** or some person represented by him, as where a horse is loaned to a friend, or a wagon is borrowed. A third class consists of those which are for **the benefit of both**

parties, as where a horse is hired out, or the use of any other thing is hired for temporary purposes, for which use some consideration is to be paid, or where a carrier undertakes to transport goods in which case compensation is paid for the carriage of the thing.

The **degree of care** which is required of the bailee differs according to the nature of the transaction. In the first class the bailee is only required to **exercise such ordinary care** as he exercises in regard to his own property. In the second class he is required to exercise **a higher degree of care** and take every reasonable precaution to avoid loss or injury to the article intrusted to him. In the third class the degree of care to be exercised is **according to the nature of the transaction** and the conditions of the contract and except in the case of a common carrier, the bailee is only required to exercise such care as an ordinarily prudent and careful man would exercise in regard to his own property. The finder of lost property is a bailee for the owner.

When a person receives the goods of another to keep without recompense, and he acts in good faith keeping them as his own, he is **not responsible for their loss or injury, as by fire or robbery.** This is for the reason that he derives no benefit from the transaction and is only responsible for bad faith or gross carelessness. If a person without expectation of reward undertakes as a friendly act to drive a horse from a residence to the stable, he is only liable for loss if he is guilty of carelessness or reckless conduct.

A **borrower** on the other hand who receives the entire benefit of the transaction must take **special pains** to take proper care of the thing borrowed and he is responsible for even a little neglect.

In the third class there is a mutual advantage, as where an article is pledged for a loan of money, or where a person, as for example, takes cloth to a tailor to be made up into clothes. In such cases **both parties stand on an equal footing** and the bailee can only be held responsible in case of loss or injury,

where he has failed to use ordinary care and reasonable prudence in the care of the article intrusted to him.

No one can become a bailee without his consent, and therefore there can be no bailment of any article unless the party accepts the responsibility. There may be a **constructive bailment,** as where a lost article is found and taken in charge by the finder. Any kind of personal property can be the subject of a bailment and anyone who can make any kind of a contract may become a bailee. In the case of common carriers, warehouse men, or wharfingers, who hold themselves out to the public as willing to undertake the duty of caring for or transporting merchandise, there is an obligation on their part to receive goods in their particular line from anyone who offers them and they cannot refuse to receive them. A **bailor may not be the absolute owner of an article,** but it is sufficient if he can assert his right of possession as against everyone but the **true owner.** For example, an agent can deposit or deliver articles or merchandise to some one for the purpose of having something done in regard to them, without parting or attempting to part with the ownership. The bailee has the right, except as against the bailor, to retain the article for his charges and he has a lien on the article for its hire or for the value of the services which he performs in regard to it.

The ordinary cases of bailments are where an article is delivered to another for repairs, or where money or valuables are placed in the charge of a safe deposit company, or where personal property is pledged for a loan, or deposited in a warehouse for safekeeping, or delivered to a carrier for transportation. Except where articles are taken to a shop for repairs, or pledged to a pawn broker, or hired for temporary use, as a horse from a livery stable, the contract is usually in writing and evidenced by such writings as a warehouse receipt, bill of lading, or other kind of written acknowledgment.

CHAPTER VII.

BANKRUPTCY.

A PERSON unable to pay his debts in full is said to be "**bankrupt,**" or "**insolvent**". A distinction is made between the two words: a person is "**bankrupt**" when he is **unable to pay his debts as they mature in the ordinary course of business,** and "**insolvent**" **when his liabilities are greater than the fair cash value of his property.** Up to a comparatively recent period a person either insolvent, or bankrupt, not only was liable to have his property seized by creditors, and he himself imprisoned, but the liability continued indefinitely. The law makers determined not only that the right of the creditor to pursue his debtor should be limited to a certain period by **statutes of limitation,** but that the bankrupt might, on surrender of all his property to be distributed pro rata among his creditors, receive a **discharge from all liability** and thus be enabled to make a new start. This was the reason for the enactment of bankruptcy laws.

Under the Constitution Congress has the power to establish, and has established, a **bankruptcy code** whereby an insolvent person may avail himself of its provisions and, by compliance therewith, obtain a discharge from all his debts; or creditors may, without the consent of the debtor, have him declared bankrupt by the court and his property taken possession of by authority of the law and sold and the proceeds distributed equally among his creditors under the direction of the court.

By Act of Congress the United States District Courts are made **courts of bankruptcy** and a form of procedure is established whereby a bankrupt may have himself declared such on his own application, or his creditors may compel him to become bankrupt. The **federal bankruptcy act** supersedes the **state insolvency laws,** or those state laws which provided how an insolvent might have his property equally distributed among his creditors but did not provide how he could be discharged from liability for any deficiency of the assets to cover liabilities. The federal act provides that any person owing debts which he is unable to pay may, upon application, be declared

bankrupt, and, if he has fairly and fully surrendered all his property and complied with the requirements of the law receive a discharge from all his debts.

A **discharge in bankruptcy, however, does not release** a bankrupt from taxes or debts due the government; or liability for obtaining money by false pretenses; or judgments for wilfull and malicious injury to the person or property of another; or for alimony allowed for the maintenance or support of wife or child; or a judgment for seduction of an unmarried female; or criminal conversation, that is damages for illicit relations with the wife of another, or debts that were created by fraud, embezzlement or defalcation while acting as public official or in any fiduciary capacity.

A bankrupt also may be **prevented from obtaining his discharge** by failure to comply with the provisions of the law in other respects; as where a trader has failed to keep books of account or has been guilty of other reprehensible conduct, such as having concealed his property with intent to defraud his creditors. A discharge in bankruptcy may be revoked if obtained by fraud.

Any person owing debts which he is unable to pay may have the benefit of the bankrupt act by applying in proper form to the U. S. District Court. Any natural person, except a wage earner, or farmer, and any corporation, except a municipal, railroad, insurance or banking corporation, owing debts to the amount of one thousand dollars or over, may be **adjudicated bankrupt** on the proper application of creditors. An involuntary petition against a bankrupt may be filed by any three or more creditors who have proveable claims against such person, or corporation, amounting to five hundred dollars or over, or, if all the creditors are less than twelve in number, anyone of such creditors having a proveable claim for more than five hundred dollars, can file an involuntary petition in bankruptcy against the debtor.

If an **involuntary petition** is filed, if the charges are denied, **a trial is had** to determine whether or not the defendant is bankrupt and whether he has done any of the acts amounting in

law to acts of bankruptcy. The **acts of bankruptcy** are concealing or removing property by a debtor with intent to delay or defraud creditors or permitting it to be done; or transferring while insolvent any portion of his property with intent to prefer one creditor over another; or permitting, while insolvent, a creditor to obtain a preference by legal proceedings, or if the insolvent has applied for a receiver, or trustee, for his property, or made a general assignment for the benefit of his creditors.

Upon **adjudication** the matter is referred to an officer called a **"referee in bankruptcy,"** before whom a meeting of the creditors is held to select a **trustee** to administer the estate, and the administration is in charge of such trustee acting under the superintendence of the court or the referee.

Under some circumstances, in order to preserve the property where an involuntary petition in bankruptcy has been filed, or in cases of a voluntary petition, before a trustee is elected, **the court will appoint a receiver** for the property, or order the marshal to take charge of it in order to preserve it for the creditors.

The present bankrupt law of the United States was passed in 1898 and amended in 1910, and has proved beneficial in its operations.

CHAPTER VIII.

BANKS AND BANKING.

A **BANK** is an institution for receiving deposits, making loans and generally for the dealing in money, exchange, (which consist of drafts or orders for the payment of money drawn on persons or firms, or banks, in other cities or countries) and securities, such as bonds or promissory notes. The business may be conducted by corporations or individuals, although under the laws of most states only corporations can act as bankers. **Banks are either State or National. Savings banks also constitute a class by themselves.** Of late years **trust companies** have been formed under state laws to unite with the business of banking the acting as administrator, executor, guardian or trustee. These trust companies while practically banks operate under special laws defining their powers. Banks receive deposits of money, make loans, which are called **"discounts,"** buy and sell negotiable paper and bonds and buy and sell exchange, or drafts, on other cities, or countries. **National banks** have the power under the act of Congress to issue their notes, secured by the deposit of government bonds, which form part of the money, or currency, of the country.

Unless forbidden by statute banking is open to all persons, but as the business is public in its nature the **state** for the better protection of its citizens **has power to regulate it** and confine it to corporations organized under general laws and supervise their operations.

Corporations for the transaction of banking business are organized either under state or national laws with capital stock and stockholders, and those who own stock in national banks are liable for an additional amount equal to the face value of their stock, should such bank become insolvent. This is called **double liability.** A bank may by its by-laws or charter have a **lien,** or preferred claim, on the stock of the stockholder for any **indebtedness due from him to the bank.** The business of the bank is transacted by its principal officers, generally known as president and cashier, and its board of

directors. The **powers of the officers** are governed by the charter and by-laws, the statutes of the state and the laws of agency. The **directors** usually meet periodically for the transaction of business and sometimes have a committee known as the "discount committee," to pass upon loans. In smaller towns the cashier of a bank is generally its manager and has power to do such acts as are within the apparent scope of his authority as such. Under the laws of the State the **officers of a bank may be criminally liable** under certain circumstances, as in receiving deposits knowing that the bank is insolvent.

The dealings between a depositor and a bank are those of debtor and creditor, in fact the depositor loans his money to the bank to be repaid at his request in such amounts and at such times as he may make demand therefor, or at an agreed time in the future. In the latter case the depositor receives what is known as a **"certificate of deposit"** payable at the agreed time in the future. In the former case the bank opens an account on its books with the customer and gives him usually what is called a **"pass book,"** in which entries are made of the deposits, and periodically the checks are returned to the depositor and the gross amount entered on the book showing the balance remaining to his credit. This is called having the book balanced. A customer is bound by the by-laws of the bank if he knows of them and is also bound by the banking customs of the locality if reasonable.

Part of the business of a bank is buying promissory notes, or commercial paper, which is called **"discounting".** Discount is another word for the interest deducted from the amount loaned by the bank at the time of making it, and is used to denote the act of giving money for a bill of exchange or promissory note deducting the interest.

The taking of legal interest in advance is not usury but is allowed only for the benefit of trade.

There is a difference between buying a bill of exchange and discounting it, the former word is used when the seller does not guaranty its payment and is not accountable for its non-

payment as where he writes his name on the back of it prefixing the words, "without recourse."

Part of the business of a bank is to make **collections of drafts drawn by a depositor** upon his debtors, or checks or drafts deposited by him, and where a bank takes paper for collection it is bound to use ordinary care in the selection of agents through whom to make the collection and is only liable for negligence in so doing. If it has given the depositor credit for a draft as cash if such draft is dishonored it has the right to charge the same back to him. If it receives forged paper on deposit, it may upon discovery of the spurious nature of the instrument demand reimbursement from the customer within a reasonable time after the discovery of the defect. If the **bank is insolvent** at the time of receiving a deposit it is fraud to receive it and the bank acquires no title to paper so rereived. In **collecting commercial paper** under special instructions, a bank and all its subordinate agencies undertaking the service, and having a knowledge of such instructions, is bound by them. In some states the agent is responsible for the conduct of any subordinate employed by it in making a collection as fully as if it had performed the entire service itself, but **as a rule the bank is only bound to select one who is, so far as known, competent and worthy of trust and is not liable in case of a failure of an agent selected under such circumstances.** In making collections the bank must use **due care** and **diligence,** especially with regard to presentation, protest and the like. That is to say, it must not delay presenting, or forwarding, collections and if payment is refused it must have the draft or note, protested if protest is not waived. It has **no authority to renew an obligation or give an extension of the paper** unless specially authorized, and it can only receive payment of collections in money. It is also bound to **remit the proceeds** promptly upon receipt of the same. A **collecting bank is liable** for failure to use diligence in presenting paper for acceptance or payment, for not giving due notice of dishonor and having the paper protested, and while it may relieve itself by contract from the negligent acts of its agent, it cannot relieve itself by contract from the consequences of its own negligence.

The orders drawn by a customer on a bank are called "**checks.**" Where a check is marked good by a bank, it is called a "**certified check**". Sometimes instead of certifying a check the bank issues therefor a **cashier's check,** that is its own check. The **drawing of a check on a bank does not bind the fund against which it is drawn until the bank has notice thereof, or until the same is presented for payment.** The **deposits made by trustees, executors, administrators, assignees for the benefit of creditors and public officers,** should be made in the name of the officer in his official or trust capacity. If a bank, having knowledge that a fund is held by a customer in trust, applies it to the personal indebtedness of the depositor it is liable therefor.

In many states **savings banks** are created with particular powers and duties defined by statute. The method of dealing with a savings bank is somewhat different from that of the ordinary bank, in that the deposits can only be withdrawn by presenting the pass-book, and sometimes the deposits cannot be withdrawn except by giving notice of the intention to withdraw a certain time in advance of the withdrawal. This is because a savings bank loans out the money of its customers on securities payable at distant dates and is not prepared and cannot pay its depositors if all make demand for payment at the same time. The business and powers of savings banks are usually defined by statute.

It will thus be seen that a bank may maintain two kinds of dealings with a depositor; it may be his **debtor** with respect to deposits and his **agent** as in the collection of drafts drawn by him. A bank being only a debtor is absolutely liable to its depositor for the loss of a deposit, even though such loss may occur because of circumstances entirely beyond its control. A bank, however, may receive a **special deposit** of stocks or bonds, or other property, which are to be kept intact and in such case it is only bound to use the same care as it would exercise in keeping its own property of a similar character, and whether or not proper care has been taken is in case of loss a question of fact to be determined from all the circumstances of the case.

For many deposits a bank issues its **certificate of deposit** payable in six months or a year after its date, and it is uncertain in law just what the character of such a certificate of deposit is whether it is a note or a receipt for money but as a general thing the certificate is negotiable and is governed by the same rules which apply to promissory notes.

It is a custom for persons often to exchange checks, which are called **"memorandum checks,"** and also to give **post-dated checks.** Where two persons exchange checks which are post-dated, each agreeing to meet his check at maturity, the failure of one to do so is no defense if such check has been negotiated to a bona-fide holder who has taken the check in due course of business; and where checks are exchanged for mutual accommodation neither can sue the other on his check until he has paid the one given by him.

As a rule a bank is protected in **paying out a deposit** only when it has an order from a depositor himself or his authorized agent. A president of a corporation is not authorized by virtue of his office alone to draw corporations checks. The authority must be given by some resolution of the directors or by a by-law.

Where there are **two or more executors or administrators** either of them can sign a check and it will be good without the signature of the other, but where a deposit is made by two or more trustees all must sign a check. Where money **is** deposited by a **public officer** whose term has expired the deposit is subject to the order of his successor.

A bank is not authorized to pay a **post-dated check** until its date, as the presumption is that the maker has an inadequate fund at the bank at the time, but will have enough when the date of the check arrives. A check given in the ordinary course of business for a debt is not payment of the debt until it is paid; if payment be refused without the holder's fault he may resort to the original indebtedness.

A **person receiving a check on a bank in the same place must present the check the same day,** or at the latest the following day, but if the holder of the check and the bank are in differ-

ent places the check must be forwarded for presentment on the day after it is received.

A bank is bound to pay a depositor's check if it has the funds to his credit, but if the check exceeds the deposit ordinarily the bank may decline to pay it, although if it wishes it may credit the amount of the deposit on the check. If the bank refuses to pay a check when it has sufficient funds on deposit, and there is no good excuse for the refusal, **the depositor is entitled to sue the bank for damages.** Generally the holder of an unaccepted check has no right to sue the bank for refusing to pay a check, although in some instances a different rule applies. If the bank accepts the check it is bound to pay it.

It is a general rule that **the drawer of a check can stop payment** of it at any time before the bank accepts it, but the drawer of the check is liable to the holder for the consequences of the refusal. The death of a maker of a check, as a rule operates as a revocation of the check, but if a bank pays the check before it learns of the drawer's death, such payment is justified. In some states however the check operates as an assignment of sufficient funds to pay it and in that case the death of the drawer would not operate as a revocation.

Where **a check is certified** by the proper officer of a bank it is an appropriation of so much of the money of the depositor as is necessary to pay such check. If a bank certifies a **forged check** it must stand the loss unless it has some recourse on the person who has presented it. The bank is presumed to know the signature of its customer and if it pays a forged check it cannot charge the amount to his account unless the depositor has been negligent, as when the drawer has prepared his check so carelessly that it can easily be altered; in that event only himself is to blame and the bank cannot be held liable for the consequences of such negligence. When the bank book is balanced and checks returned it is the **duty of the depositor** to examine all checks and endorsements thereon within a reasonable time and report any forgeries or errors. After a reasonable time has elapsed the depositor, having failed to examine the checks at the proper time, cannot recover from the bank the

amount paid on checks which have been discovered to be forgeries, or not properly endorsed, without proof that the bank could by proper care and skill have detected them. Money paid by mistake on a forged check cannot generally be recovered from the payee if payment has been made to him. A bank must always use **reasonable diligence** in giving notice of a forged check after its discovery, but mere lapse of time between the time of payment and notice of the forgery will not deprive the bank of the right to recover the money. If a bank pays a forged check it has no recourse against the depositor whose name is forged. An endorsement by a person bearing the same name as the payee, but who is not the real person, is a forgery and the check must be paid by the bank to the true owner of the paper.

If a bank holds a customer's paper or a debt is due the bank from a depositor and his deposit is sufficient to meet the obligation, **the bank usually has a right to apply such deposit to the payment of the debt,** but it cannot apply for the purpose any trust funds held by the depositor. A bank cannot apply the deposit to an indebtedness of the customer which has not matured, although in some states, if the depositor becomes insolvent before the maturity of the debt, the bank may apply the deposit to the payment of the debt, but a different rule prevails in other states and the insolvency of the depositor gives the bank no right to retain the deposit for a debt which has not matured against a checkholder who in good faith presents his check before the maturity of the debt.

In some states if a person makes **a note, or other obligation, payable at the bank,** it is equivalent to a request to the bank to pay it out of any funds of the maker on deposit, but usually there must be a special request to the bank to pay such paper.

In the large cities, the banks usually appoint an agency for the exchange of checks on each other called a **"clearing house".** At a certain hour each day a messenger from each bank presents at the clearing house all checks which it has received the day before on deposit and mutual exchange of such checks among the messengers of the banks represented is made, so

that each bank receives credit for the checks on the other banks it has presented and is charged with the checks presented by the other banks on it, and if a balance is due from any bank to the clearing house it is collected during the day from the debtor bank and if any balance is due to any bank it is paid from the collections of debits. These clearing houses have rules for the regulation of their business and relating to the time for return of a check afterwards found not good and such rules are binding upon all the banks who have agreed to them.

(For further information as to checks, drafts and promissory notes, see the subject "Negotiable Instruments.")

CHAPTER IX.

BONDS.

IN law **a bond is simply an obligation under seal to pay a certain sum of money.** Formerly great importance was attached to a seal and there was a difference between a simple promise, or contract, signed by a party and one to the signature to which was attached a seal. The seal was an impression of a device on wax affixed just after the signature. Gradually a scroll came to be substituted for the wafer, or wax, upon which was an impression of the seal, and at the present time seals have come into disuse except corporate or official seals, and in some states private and personal seals have been abolished by statute.

There is some difference between **various kinds of bonds,** as for example those given by a public officer, or public official, or officer of a corporation, to insure the faithful performance of his duties, and a bond issued by a corporation, or individual, to secure the payment of money. A bond for payment of money is simply a more elaborate writing, in which is contained, generally not only the promise to pay money, but also a recital of the security given for the payment, as for example, a corporate bond recites not only the obligation to pay the money, but what security is given for this payment and the conditions under which the security given may be enforced, as by a sale of the specified property. This kind of a bond may be given by an individual or a business corporation, or a municipality.

Most **public officers are required by law to give a bond** for the faithful performance of their duties in a specified sum and with security. Corporations now exist whose business is to become sureties on bonds. A bond may be given on an **appeal from a judgment** to secure its payment, in which case it is for double the amount of the judgment as a usual thing, and with sureties to be approved by the court. **Bonds given by a municipality,** as for example, a state, county or city, are only valid when authorized by law and are pledges of the public credit, and are sold on the reputation or resources of the municipality. **Railroad and other corporate bonds** are usually secured by mort-

gage or deed of trust, or pledge of corporate securities placed in the hands of a trustee. A **municipal bond** generally recites the authority under which it was issued and the acts done in accordance with the statutory requirements, and to it are attached what are called interest coupons, or interest notes; for example, if a municipal bond runs ten years with the interest payable semi-annually the bond itself recites the promise to pay the principal sum and to it are attached twenty interest notes maturing every six months from the date of the bond. These are called **"coupons"** and recite that they are for interest on a bond referred to by number. If a railroad issues bonds they are also in much the same form and with coupons. **Bonds may be registered,** that is they are recorded with the name of the owner, usually by a trust company, and the bond recites that it is registered in the name of the owner, and the semi-annual, or quarterly, interest is paid by the debtor corporation by checks mailed to such owner.

The person or corporation making the bond is called the **"principal,"** or **"obligor,"** and the person to whom the bond is given or is payable is called the **"obligee".**

Bonds given to secure the performance of some duty are for a specific sum, called the **"penal" sum,** which is for say ten thousand dollars, with a condition that if the duty is performed the bond is to be void; thus if a man takes an appeal from a judgment rendered against him, he gives a bond for double the amount of the judgment, which bond is to be void if on appeal the judgment is affirmed and is paid. A **recovery on a bond** of this kind can only be for the amount of the judgment, interest and costs, or if it is given to secure the performance of some work, as by a contractor, only the amount of the loss as security against which the bond was given, can be recovered.

The **bonds for the payment of money,** such as municipal or corporate bonds, are the most common and are **negotiable instruments** and pass by delivery or assignment, as the case may be. A bond may be payable to bearer with the interest coupons also payable to bearer, in which case the property in the bond passes by delivery or if registered the method of trans-

fer is provided for in the bond; ordinarily an assignment is made which is registered or recorded.

The **essentials of a bond** are, that it must be properly authorized, executed and delivered, upon a sufficient consideration, by competent parties for a purpose not illegal. **Municipal bonds** must be issued in precise accordance with all the conditions prescribed by the law of the state authorizing the issue. In purchasing such bonds care should be taken to see that they are vouched for by a competent authority. There may be a **series of bonds,** secured by successive mortgages, or deeds of trusts, as for example, **first mortgage bonds,** which are those secured by a first mortgage lien, **second, third or fourth mortgage bonds** successively secured by second, third or fourth mortgages respectively. It is customary for railroads to issue different series of bonds secured by mortgages, some of which are the first lien, others second lien and others third. Railroads sometime issue what is called **"debenture bonds,"** which are bonds sometimes without any security and sometimes secured by the deposit of other securities with a trustee under an instrument providing that if the bonds are not paid, or if there be a default in payment of interest, the securities pledged may be sold by the trustee.

A **bond,** therefore, in the common acceptance of the word is simply **a promise to pay money upon specified conditions** and is to be construed the same as any other contract. Generally when given for the payment of money alone, as by a corporation, a bond is simply a more formal promissory note. In case of a **failure on the part of the principal to pay a bond,** if there is personal surety, such surety may be called upon to pay; or if payment is secured by the pledge of personal property or mortgage of real property, sale can be had in accordance with the terms of the mortgage or instrument of pledge. If a **bond is given for the faithful performance of duty,** as by a public official, or an administrator, or executor, recovery may be for the amount of the loss sustained because of the breach.

CHAPTER X.

COMMON CARRIERS.

A **CARRIER is one who undertakes for a consideration the transportation of persons, or moveable property, and two classes are recognized, namely, "private carriers" and "common carriers."** A **private carrier** is one who undertakes, without being engaged generally in the business, to deliver goods at a particular place for hire. In law he is not an insurer, but is **liable only for a failure to exercise such care and skill as an ordinarily prudent man would exercise in his own business.** He differs from a **common carrier,** who is one who holds himself out to the public as engaged generally in the business of carrying persons or freight for hire and is obliged by law to undertake the charge of transportation from all persons who desire to employ him; whereas a private carrier is only bound to transport property if he is willing to undertake the duty. **A common carrier is also an insurer,** that is, if he loses the goods entrusted to him, except by act of God, which is only another name for an inevitable casualty, such as a tornado or earthquake, he is liable to the owner for the value of the goods. This duty is imposed upon the common carrier for reasons of public policy and most of the law suits involving the question of liability arise from the desire of the common carrier to limit his liability by special contract.

A **common carrier** is one who undertakes for hire, or reward, to transport the goods of anyone who chooses to employ him from place to place. **He must hold himself out to the public** as ready to engage in the business of transportation of goods for hire. He is not bound to carry goods of any description for every person, but only in accordance with his public profession. Thus railroad and express companies are common carriers and this is so not only in regard to property, but also so far as the former are concerned, as to passengers and their baggage.

Common carriers owe to the public **the duty of carrying goods without discrimination** for all who desire to employ them, but they may restrict their business to particular classes of property

and they may refuse to receive dangerous articles, such as explosives and chemicals liable to ignite. A **railroad company** is bound to furnish suitable cars, as required by customers upon reasonable notice whenever it can do so with reasonable diligence, without injury to its other business and cannot discriminate between shippers. **It is bound to provide facilities** for receiving freight, yards for live stock and suitable accommodations for passengers, and it may make pre-payment of its charges a condition for furnishing transportation. The relations between a railroad company and an express company, whereby the latter obtains the right to have its goods transported, is a matter of special contract. **A railroad company is not required to transport goods to a point beyond its line,** unless it holds itself out as ready and willing to undertake the service, and **a common carrier is liable for damages** for refusal to receive property for transportation, which damages include the cost of keeping the goods during the delay, the difference between the value of the property where it was tendered for transportation and its value at the place where it was to be delivered less the freight charges, and is also liable for such reasonable profits that could have been obtained by the shipper in his business, of which he has been deprived by this refusal of the carrier. **The carrier is also liable if it wrongfully refuses to accept property for transportation,** for the expenses of protecting such property, and such damages for delay which are the necessary and usual result of the wrongful act and for the deterioration of the property during such delay; and it is also liable for the expenses of delivering the property to it a second time or for its loss by theft, where the shipper has had no reasonable opportunity to dispose of or protect the goods.

In order to constitute a person or corporation a common carrier he, or it, **must hold himself, or itself, out to the public as engaged in the business** of transportation for hire. **The general rule as to a common carrier's liability** with reference to goods is that he is liable for all loss, or destruction, or injury to goods not occasioned by the act of God, or inevitable calamity, or the public enemy. **The act of God** means some casualty not due to human agency, as has been stated, viz:

an earthquake, tornado or fire occasioned by lightning, or a flood of such extraordinary character that it could not have been anticipated and guarded against. **The common carrier is not liable** for some injury or destruction to property caused by the negligent act of the owner, as where the goods are not properly packed. He is liable for negligence in loading or unloading, but is not liable if the injury to the goods is due to their inherent nature, or defects therein. So where injury results to live stock, because of the peculiar nature and propensities of the animals, the carrier is excused from liability if he has exercised such reasonable care and foresight as ought to be reasonably exercised under the circumstances.

Common carriers are accustomed to give receipts for goods received for transportation, which are called **"bills of lading,"** in which they often seek to limit their liability, but in most cases such limitations are forbidden by statute. A common carrier may make **reasonable limitations of his liability,** such as exempting itself from liability from any inevitable cause, or loss or damage by fire, or, if engaged in the business of transportation by water, for loss occasioned by casualties such as shipwreck, or storm, but **such carrier cannot by contract exempt himself from liability for loss occasioned by his own negligence, or the negligence of his employees.** There are a great many technical questions involved in determining the liability of common carriers and it is only possible to state with any degree of accuracy the law as to liability in general terms, because different states have different laws and the courts differ in their opinions.

In order that the carrier may be **charged with liability** for the custody, care and transportation of goods, they must be **delivered to him** and such delivery must be complete. Often when the goods are delivered to an agent of the carrier, care must be taken that such agent has the authority, or an apparent authority, to receive the goods. **Bills of lading** are receipts given for the goods and are generally negotiable. For example, a man ships goods from New York to Chicago, subject to his own order; then he endorses the bill of lading over to

the person to whom the goods were sold and attaches it to a draft on the person to whom the goods are sold for their price, which draft is deposited in bank for collection. In such case the goods can only be obtained by the purchaser by production of the bill of lading after payment of the draft. Or goods may be shipped direct to the purchaser on what is called a free bill of lading. **This bill of lading is for many purposes the representative of the goods shipped,** and the title to the goods while they are in the possession of the carrier may be transferred by the owner by assignment of the bill of lading so that in this sense a bill of lading is a negotiable instrument, but not in the same way as promissory notes or bills of exchange, which stand for money and which pass by delivery; the transferee of a bill of lading has no higher title to the goods mentioned in it than the person by whom the transfer is made. **In many states statutes declare bills of lading to be negotiable,** but this amounts only to saying that such bills of lading can be transferred and operate as a transfer of the title to the goods. **If a bill of lading is fictitious** the person to whom it is delivered acquires no rights because it represents nothing, but if the carrier is negligent in issuing the bill of lading he may be liable. The statutes of most states provide that no bill of lading shall be issued unless the goods named therein have been actually received by the carrier.

There is a legal right, the technical name of which is **"stoppage in transitu,"** that is the right of the person who sells goods on credit which have been delivered to the carrier for transportation to such purchaser, in case the purchaser becomes insolvent before the carrier has delivered the goods to him, to prevent delivery by giving notice to the carrier and retaking possession. This is a technical branch of the law of sales and ought not to be discussed in this place.

By joint arrangement between different railroads, or other common carriers, what is called a **"through bill of lading"** may be given, that is a bill of lading covering carriage by two or more connecting lines or carriers.

A common carrier has a lien on the goods transported for his

charges of transportation, but the lien only attaches to the goods involved in the transaction and does not extend to other goods than those for the carriage of which charge is made, but such lien may include the charges necessarily incurred by the carrier, as for storage, or for charges advanced to other connecting carriers. The carrier has **no lien** as against the true owner of the goods who has never expressly, or by implication authorized, such delivery to the carrier. This lien gives the right of possession but not a right to sell unless such right is conferred by the statutes of the state.

Public carriers of passengers, such as railroads, steamboat and stage lines, are engaged in a public business which imposes upon them **the duty to serve everybody without discrimination;** they can **make reasonable rules** for the regulation of the conduct of passengers, but they **cannot discriminate,** such as to sell tickets to some and refuse to sell them to others. **The relation of passenger and carrier commences** when the former places himself in a situation to avail himself of the transportation facilities; thus a railroad is liable to a passenger when he enters the train with his ticket and sometimes when he enters the station provided for the accommodation of passengers. One who fraudulently attempts to secure transportation, as for example by presenting a non-transferrable ticket, is not a passenger, nor can a person become a passenger by attempting to board, or by presenting a ticket on, a train not provided for the accommodation of passengers, as a freight train. **Where the relation of carrier and passenger is once established, it continues** until it is ended by the voluntary act of the passenger and continues until the arrival of the passenger at his destination, and the temporary departure of a passenger, as for example alighting from the train to enter a telegraph office, or a meal station, does not terminate the relation. Persons having the privileges of trains for selling goods, or postal clerks in the United States service, are passengers. The **liability of the common carrier for injuries to passengers** is different from that to its employees. The carrier is liable to one holding free transportation for the same care and protection which is it obligated to furnish to persons paying their passage, and the com-

mon carrier can make reasonable rules and regulations for the conduct of the passengers, but must give notice of them in some way so that the passenger can have knowledge of such regulations. If a carrier has a rule, for example, requiring passengers to purchase tickets before entering the train, such rule is valid and it may impose an extra fare for failure to purchase tickets. **A common carrier has the right to exclude from its train persons who cause annoyance to other passengers,** as for example, those who are intoxicated or are guilty of riotous conduct or use vulgar, indecent and profane language. **It has a right to put a person off the train** who refuses to pay his fare, but a passenger is entitled to a reasonable time in which to present his ticket or pay his fare. If an agent selling a ticket makes a mistake, which the passenger could easily see on examining the ticket, and such ticket does not cover the transportation he cannot complain if he is put off the train.

A common carrier is liable for a wrongful expulsion of a passenger or person from its train and also liable for the **wrongful acts of its servants** done in connection with their employment. It is liable if it expels a passenger, or any person, at a dangerous time or place; or if it expels him in an improper manner, but it may use sufficient force to effect the removal of the person from the train if it does so in a manner reasonable under all the circumstances of the case.

The carrier **can limit the time within which a ticket must be used,** but such limitation must be reasonable. Usually unused tickets are redeemable. Where a ticket is sold on a particular train for a specific destination, the carrier must stop the train at the place designated and give the passenger reasonable opportunity to alight. The conductor is not bound to stop the train to let off a passenger at a place where the train is not scheduled to stop. He must, however, **stop the train at the usual platform and give the passengers a reasonable opportunity to alight from the train.** There is no contract on the part of the carrier that a particular train will arrive at its destination at a certain time. The carrier will not be liable for delays in a journey that are not occasioned by some unusual act or

by negligence which it could have prevented by proper care.

Street-car companies are liable for negligence and the same rules apply to the carriage of passengers on street-cars as by railroad or steamboat, having regard for the particular differences in methods of operation.

So **a public elevator** in an office building is a common carrier and the owner of such building is liable for its negligent operation.

All common carriers are bound to render proper protection to their passengers against annoyance from fellow passengers and protect them from injury by strangers. They are liable for injuries to passengers by accident, but are not liable if the accident is due to causes which could not be guarded against by proper care, or are inevitable and which could not have been avoided by the exercise of a high degree of care. A passenger on a railroad is entitled to protection against danger in the waiting room and on the platform and in getting on and off a train. Common carriers are obliged to provide reasonable accommodations for passengers and are bound to employ competent persons as employees or servants.

If an accident is caused to a passenger because of his own negligence, the carrier is not liable.

A carrier is liable for loss of the baggage of its passengers, but the authorities do not always agree as to what constitues baggage. The general term **"baggage,"** or **"luggage,"** includes such articles of necessity and comfort as are usually carried by passengers for their personal use and protection, having regard to the circumstances, business and condition in life of the passenger and the nature and extent of the contemplated journey.

CHAPTER XI.

CONTRACTS.

A **CONTRACT is an agreement between two or more persons, for a consideration to do or not to do some specific thing.** It will be seen, therefore, how broad this subject is, because it covers agreements of every kind, nature and description, whereby parties contract with each other to do, or not to do, something.

A contract in order to be binding must be made by persons competent to enter into it. In law male persons under the age of twenty-one, and females under the age of eighteen are termed **infants, or minors,** although in some states all persons under twenty-one are infants. **An infant is not competent in law to make many kinds of contracts.** He can contract, however, for necessaries. He or she can, after a certain age, make a contract of marriage. The subject of minors, or infants, is treated of in another place. The contracts of an infant may be good, or voidable at his election, or absolutely void.

At common law **husband and wife** were considered one person, and the husband was the person, so that a wife was not competent to make contracts in her own right and that is still the law in some states, although it is believed that at the present time in practically all the states married women are relieved of all disabilities as to powers of contract and may act as if unmarried except perhaps in certain instances, as for example in making a contract of suretyship.

Insane persons are also incapable of making a contract. A person may be afflicted with degrees of insanity; he may be an idiot, or simply suffering from hallucinations, or be partially insane, or be weakminded from the infirmities of age or disease. A person though insane at times has the power of making a contract in lucid intervals if he has such. **An insane person is liable for necessaries furnished for his support.** To invalidate the contract of an insane person, the insanity must so far impair the understanding as to preclude a free and intelligent consent to the terms of the agreement.

A **drunken person** in some respects is on the footing of an

insane person, for example if the drunkenness is to such an extent as to impair his understanding of the business in which he is engaged.

The government of the United States, or of a state, can contract the same as an individual, but such contracts must necessarily be made through agents and the acts must be within the authority of the officer making them. Foreign governments can also make contracts.

Corporations can enter into contracts through their proper officers and the powers of a corporation in the matters of contract will be treated of under that heading.

All individuals, or corporations, can contract through agents and that subject has been heretofore discussed under the head of agency.

Contracts are divided into two classes, those which are "express," that is specifically entered into between two or more persons, **and "implied,"** as where the law will imply a promise, as for example, if a man orders goods to be sent to his residence, or place of business, and no price is agreed upon, the law implies a contract on his part to pay the market or reasonable price for them. So, if a person accepts the services of another there is an implied contract on his part to pay the reasonable value of such services.

It is necessary in order that a contract may be binding that there be a consideration for the promise or undertaking.

In law different kinds of considerations are recognized. A **good consideration** is such as that of blood, or natural love and affection, as where a parent, in consideration of love and affection, deeds property to a child. A **valuable consideration** is such as money, marriage, or the like, esteemed in law an equivalent for the grant and is founded on motives of justice. A consideration may be either money or something beneficial to one party or disadvantageous to the other, or if there are two parties to the contract and one agrees to do something if the other will do something, these mutual promises are equal to a consideration each for the other and answer the requirements of the law. A consideration **immoral, illegal, or contrary**

to public policy, will not support a contract. Agreements to do something in violation of law are void, and if the consideration is an immoral act, as for example, to pay a certain sum in consideration of not being prosecuted for embezzlement, such a consideration is illegal.

It is necessary for a valid express contract, as distinguished from an implied contract, that there must be **a mutual consent or meeting of the minds** of the parties, that is each party must have an intention of consenting to the contract. Of course where a contract is in writing and signed by the parties, there can be no question as to consent, but if the contracts are verbal there must be in that case an intention on each side of being bound by the agreement and such intention must be understood by both of the parties. A contract is based upon an offer to do something and the acceptance of that offer and there must be a certainty in the offer and in the acceptance. For example, a proposal is made by letter. This is only an offer or proposal, and if the party to whom the letter is addressed by reply to such letter expresses an intention to accept the offer made, the two letters constitute a contract. If a person says to another, I will sell you this horse for $100, and the other party says I accept your offer, that is a contract, although if the price is not then paid something must be paid to bind the bargain or the contract must be in writing. **Contracts must be certain in their terms,** although any agreement is certain if the intent of the parties can be ascertained. An offer to sell goods need not specify the price, for if no price is stated it is presumed that the market, or reasonable, price is intended. An acceptance of an offer may be often inferred from the silence of a party, as if one person sends goods to another without being asked to do so; if the persons to whom the goods are sent uses them or deals with them as his own, he will be deemed to have accepted them and to have promised to pay their reasonable value to the person from whom they were received. A person receiving goods under those circumstances is not bound to return them. To bind himself he must indicate by some act an intent to retain them. When an offer is made it must be accepted within a reasonable time, or within

the time specified in the offer, and what is a reasonable time always depends upon the circumstances of each case, as for example, an offer to sell land necessarily implies that the person to whom the offer is made shall have a reasonable time for investigation. The death or insanity of either party before acceptance of an offer is made, terminates the negotiations and is a revocation of the offer. An offer may be accepted by telegraph.

In past times there was a distinction made between **contracts under seal** and contracts to which signatures were affixed without a seal, but in modern times it is only necessary for a contract to be in writing and signed by the parties and private seals have in most states been abolished.

A person is not bound by an agreement unless he has agreed to it without being influenced by fraud, violence or improper means. It is the duty, however, of every contracting party to know the contents of a writing before he signs it. The law does not permit one to avoid a contract into which he has entered on the ground that he did not understand its terms. If a person cannot read, it is his duty to get someone to read the paper for him. On the other hand if a party induces the other to sign the paper without reading it, relying upon his statement of the contents, if such statement was fraudulent the contract can be avoided. If some **trick** is used as the substitution of another document for the one which a party thought he was signing, such **act is fraudulent** and will avoid the contract. **Where both parties are mutually mistaken,** so that their minds did not meet, court will often **reform the contract** so as to make it express the intent of the parties. **Mistake of law will not affect the validity of a contract, but only mistakes of fact.** Any **fraud** practiced by one party to a contract on the other will avoid it and any false representation of a material fact made with the intention that it shall be acted upon by the other party in entering into the contract, and is in fact so acted upon, constitues fraud. If the parties stand in a **trust relation** to each other, as a guardian to a ward, or as trustee to his beneficiary in order to make a contract between them

valid it must be entirely fair and is always open to inquiry. A **mere representation of opinion,** although mistaken, is not in law a fraud, nor is a representation of intention or expectation as to some future act, nor is a mistaken statement of the law fraudulent, because both parties are presumed to know the law. **In order that a false representation may amount to fraud, it must be made with knowledge of its falsity.** If people take upon themselves to make assertions as to things of which they are ignorant whether they are true or untrue they are held responsible to the same extent as if they had asserted what they knew to be untrue.

The **law presumes** that persons will naturally exaggerate the value of what they have to sell, or exaggerate the value of services, and if such statements are not such as reasonable men are in the habit of relying upon in determining whether to enter into a contract, they do not consitute fraud; and so where a person can easily satisy himself as to whether the representations are true or false, he cannot, if he neglects the opportunity of informing himself, afterwards claim that he has been deceived. A person who has been induced by fraud to enter into a contract, may upon discovering the fraud rescind, or declare that he will not be bound by the contract, and repudiate it, but he must restore or offer to restore, the consideration which he has received from the other party under the contract. So if a person has been induced by fraud to buy goods he may on discovery of the fraud return the goods, but if he does not return them he must pay the price, or at least their value. The party deceived, however, is not required to return a thing which is absolutely worthless, as a forged note.

If a party has been forced by threats of personal violence to enter into a contract, he may repudiate it, but a contract made under **"duress,"** as it is called, or by threats of violence, **is not absolutely void,** but the party forced to enter into it may afterwards affirm it as by acting upon it.

The courts will set aside a contract into which one party has been induced to enter into, by what is called **"undue influ-**

ence" of the other. What is called undue influence consists of acts which, though not fraudulent, amount to an abuse of the power which circumstances have given to the will of one individual over that of another, as where a person by ingratiating acts obtains such influence over a person of weak or susceptible mind, that the party influenced cannot refuse to do anything that the other requests. Solicitation, importunity, persuasion and argument are not undue influence, but on the other hand influence attained by superiority of will or mind or character, or by flattery, which gives a person power over the will of another so as to destroy his ability to refuse to do anything requested of him is undue influence. **Sometimes the law presumes undue influence as where there is a confidential relation,** as for example, that of parent and child, attorney and client, or where there is some trust relation, as trustee and beneficiary, or when there is mental weakness on the one side. The relations of physician and patient and persons engaged to be married, are trust relations. If a person deals with another who can neither read nor write, or who is mentally weak, **he must use the utmost good faith** and not take advantage of the other's condition. Sometimes inadequacy of consideration is ground for releasing a person from the obligation of a contract.

The courts will never enforce an illegal agreement. Such agreements may be either in violation of positive law or contrary to public policy. In the former class fall agreements involving the commission of crime, or dealings with foreign enemies, or whose object is the commission of some wrong against a third person, as to perpetrate a fraud, or infringe upon another's patent or trade-mark, or copyright, or to publish a libel. Agreements for the fraudulent raising or lowering of bids at auction sales, or for fraud on creditors, are illegal. Of course, if a statute declares certain contracts void, any agreement in violation of the statute is of no effect, but if the statute merely imposes a penalty on the doing of an act, some courts hold that an agreement for the doing of such act penalized is valid, others hold to the contrary. Sometimes where a license is required by statute for the engaging in a particular

profession, or occupation, a contract made without such license is illegal and void, as for example, an unlicensed physician in some states cannot recover for his services.

Public policy forbids any contract, the object of which is to do some act which is injurious to the public or against the public good, as for example, gambling contracts, contracts for immoral relations, contracts for the dealing in any article the sale of which is prohibited by law, as intoxicating liquor, opium, morphine, or injurious drugs. Contracts for the interference with the administration of government or justice, are against public policy and void. A salaried public official cannot agree if elected to an office to serve for less than the salary fixed by law. Contracts having for their object the interference with the integrity of elections, or with the courts of justice, as for example, to induce a witness to swear falsely or to abscond, are void. So an agreement involving the compromise of a crime is void. So is generally an agreement not to prosecute one guilty of a crime.

Agreements whose object is to oust the jurisdiction of the courts are against public policy, as for example, an agreement not to sue except in a certain court or at a certain place, or a by-law of a benefit society that the decisions of its officers on a claim shall be final and preclude resort to the courts. **Agreements against good morals are illegal;** so are those in restraint of marriage, as for example, where a man agreed to pay a woman a certain sum of money if he married any other person but her, or a contract by a person that he will not marry within a certain number of years. Contracts by which one person agrees to give another compensation if he will negotiate a marriage are against public policy, and so is a contract, the object of which is to divorce a man and woman, or agreements for the separation of husband and wife.

Any agreement which operates as an unreasonable restraint of trade is illegal and void. If a man on retiring from a firm agrees not to engage in the same business in the same town within a specified number of years, such an agreement is reasonable and will be enforced, but if he agrees never to engage

anywhere in the same business such a contract is unreasonable and void.

Sometimes an agreement may be against public policy because it affects the duty which one person owes to another, so a parent cannot make any agreement in regard to his child contrary to the child's interests, nor can a party exempt himself by contract from liability for his own negligence.

No court will aid either party to an illegal agreement, but leaves them in the same condition in which it found them. A party to an illegal agreement can set up its illegality as a defense even though it amounts to an assertion of his own turpitude.

The rights of parties to illegal contracts vary under different circumstances and in different jurisdictions, and legal advice concerning their effect should always be taken.

In construing contracts it is always necessary to seek the intent of the parties. Plain, unambiguous language in a contract will be given effect accordingly but where the language is uncertain the court will seek to discover the intent of the parties and enforce the contract according to such intent, but a contract may be so vague and uncertain in its terms that the courts will not attempt to enforce it. If one writing refers to another, they will be read together, and a contract will be construed so as to include not only what is actually written in the contract, but the things which the law implies as a part of it, such as the necessary and usual means to carry the agreement into effect. The courts will always seek to uphold the validity of a contract, rather than to hold it illegal, unless it is clearly contrary to law.

A contract may be discharged by agreement to that effect, or by performance, or by impossibility of performance, or by operation of law, or by violation of its terms by the opposite party. If the contract does not specify a time for performance the law implies that it is to be performed within a reasonable time and what is a reasonable time depends upon the circumstances of each particular case. If one party to a contract, either before the time for performance or in the course of the

performance, makes such performance or continued performance impossible, the other party is discharged from its obligation.

Contracts may be joint or several, or both joint and several; that is two persons may agree with another, so that each, or both, may be held liable at the option of the opposite party. Where two or more persons make a joint promise, each is liable and if one dies the performance is thrown upon the survivor.

The validity of a contract is generally determined by the place where it is made and if it is valid where made it is valid everywhere, but if it is made to be performed in another place, the law of the place where the contract is to be performed will determine its validity. The capacity of the parties to make a contract is determined by the law of the place where the contract is entered into, and its form is determined by the same rule. However, although a contract may be valid where made, it will not be enforced in another state where it is contrary to good morals or where the citizens of the foreign state would be injured by its enforcement, or where a contract violates the positive legislation or public policy of the state where enforcement is sought.

The validity of contracts relating to land is determined by the law of the place where the land is situated.

A party violating a contract is liable to the other party for all damages occasioned by his refusal.

Certain contracts are required by law to be in writing, by what is called the "statute of frauds." In 1676 the Parliament of England enacted a law which has probably in its main features been enacted in every state of the Union. This law provides that no executor or administrator shall be held upon a promise to pay a debt of the deceased out of his own estate; or to answer for the debt, default or miscarriage of another person; or to charge any person upon an agreement made in consideration of marriage; or any contract for the sale of lands or any interest in them; or upon an agreement that is not to be performed within one year, unless the agreement or some memorandum, or note thereof, shall be in writing and

signed by the person to be charged therewith, or some other person by him thereto lawfully authorized. This law does not, however, prevent a person fulfilling a verbal agreement, which under the law ought to be in writing, if he so desires, but the obligation cannot be enforced by legal proceedings. If one party to an oral contract has paid the consideration and the other refuses to perform his part of it because it is not in writing as required by law, the money paid may be recovered back. This law does not abolish anything in the common law of contracts, but merely provides that a contract which the law requires to be in writing cannot be enforced in court unless it is in writing.

Nice distinctions have been drawn as to what is an interest in lands, and what is a sufficient memorandum in writing to answer the requirements of the statute, and it is impossible to state any general rule. Sometimes where, under a verbal agreement, there has been a part performance, the contract will be enforced, but in all cases if a party desires to enforce any such agreement he should take legal advice.

Rules for Writing Contracts:

The general form for beginning a written contract is to give the names and residence of the parties, for example, "Memorandum of an agreement made and entered into this 10th day of June, 1913, between John Smith, of the City of Detroit, Michigan, and John Doe, of the same place, witnesseth as follows:"

The next thing to do is to **tell in plain language just what John Smith agrees to do and what John Doe agrees to do,** remembering the rule of law that **a written contract is supposed to contain the entire agreement of the parties** and afterwards neither party will be allowed to contend that something different was meant, or that there was some part of the agreement which was not inserted in the written contract. **A written contract cannot be varied by oral evidence,** although if technical terms are used, or the language is ambiguous, evidence will be heard as to the meaning of the terms, for example, if No. 1 white

fish is sold, either party may give evidence to explain what is meant by No. 1 white fish.

After the writing tells just what is to be done by each party, **it is usual to close it in the following manner,** "In testimony of which the parties have hereunto set their hands on the day and year first above written."

CHAPTER XII.

CORPORATIONS.

A **CORPORATION is a creation of the law whereby a number of individuals may associate together under what is called a "charter," or permission granted by the state to act under that name and continue to act for a specified number of years, or for an indefinite period, and although the individuals may die, or part with their interest, this artificial being continues to exist as a distinct entity.** Because many corporations have no limit to their existence they are said to be immortal.

Corporations have been divided into "public" and "private". Private corporations are associations formed by the voluntary agreement of their members, under authority of general statutes or legislative grant, while public corporations are government institutions created by law for the administration of the public affairs of the community, such as states, counties, cities and school districts.

On the other hand **private corporations may partake of a public nature,** of which railroad, telegraph and telephone companies and banks and insurance companies are examples. These corporations are formed **to serve the public** and the community has an interest in seeing that their affairs are properly administered, so the **states generally exercise control, or superintendence, over their affairs** and their business is regulated in many respects by positive law, which often restricts their operations and regulates the prices they may charge for their services and to insure their solvency their affairs are examined frequently by designated officials. Insurance companies are examples in point.

It is usual at the present time, because of the convenience and advantages of conducting a business as a corporation, for men to incorporate for the transaction of any and all kinds of business, and associations of this kind are quite common.

A private corporation is an association of individuals, acting under a name selected by them, which has power by law to transact business under that name for a specified number of

years; except in the case of charitable corporations, which are not organized for profit and have no capital stock, the interest of each member is evidenced by certificates of the extent of such interest, which are called **"stock certificates,"** or certificates of stock. These pass by transfer or assignment and the death of the holder of shares of stock does not affect the continuance of the corporation, the interest of the owner of the stock passing by assignment or operation of law to another owner.

Corporations are either business, or charitable and benevolent. The business of the former is carried on for the profit of the shareholders, or owners; the **latter are not organized for profit** but for the purpose of maintaining some institution like a school, or hospital, and from which the incorporators derive no profit. We shall consider only private business corporations, including, however, those that are formed for the conduct of business public in its nature.

A corporation differs from a partnership in that each partner is liable for the debts of the firm, but after a man has paid the par value for his stock in a corporation he is not liable for the debts of the corporation, except where the law otherwise expressly provides; for example shareholders in a national bank are liable for an amount equal to the par value of the stock, in addition to such par value, and in some states this double liability extends to other kinds of corporations.

The authority conveyed to an association to act as a corporation is called its "charter" and this authority may be given by special act of Congress or the Legislature, or, which is more usual, the association is **incorporated under the general laws** of the state providing for the organization of all kinds of corporations and when the requirements of the statutes are complied with and the documents required by law are filed with the Secretary of State, he issues a certificate of incorporation. The laws of the State under which a corporation is formed and its articles of Association form its charter and, as a general thing, a corporation only has the power to conduct the business specified in its articles of association, or charter, **and**

acts in excess of that authority are called "ultra vires," which in many cases are void and cannot be enforced, although if his part has been performed on the part of one dealing with the corporation, the latter will not under some circumstances be allowed to shield itself under the claim that it had no authority to make the contract.

The constitutions of the various states often forbid the granting by a legislature of a special charter, but require **all corporations to be organized under general statutes** and also limit the powers of corporations as well as the authority of the legislature. **Any number of persons have the right to incorporate under the general laws of the state if they comply with the requirements of the law.** The affairs of a **charitable corporation** are generally administered by trustees, who in most cases when a vacancy occurs from death or resignation, can elect a new trustee to fill the vacancy. The affairs of **business corporations** are administered by certain agents elected by the shareholders called **"directors,"** and when these directors meet together it is called a "meeting of the board." **The capital of a corporation is called "capital stock,"** and is divided into shares and the owners of these shares are called **"shareholders"** or **"stockholders."** The contract under which they act is found in the articles of association and charter. **A corporation is a trustee for its stockholders** and it is the duty of the directors to exercise due care and diligence in discharging this trust, and the directors are liable in damages for failure to perform their duty. A corporation is liable for transferring shares of stock without authority, or for wrongfully issuing stock. The officers of a corporation are agents who must act within the authority conferred upon them by the charter, or the by-laws, or resolution adopted by the directors.

The stockholders of corporations are required to meet as provided in their articles of association, generally once a year, for the purpose of electing a board of directors. This meeting must be held within the limits of the state creating the corporation and at the place prescribed by the by-laws or articles of association, and if notice is required of such meeting, this

notice must be given. If a **special meeting** of the stockholders is called, as provided for in its charter, or by-laws, a notice must be given to each stockholder stating the object and purpose of the meeting and no business should be transacted at the meeting except such as is stated in the notice. Usually a majority of the board of directors constitute a quorum.

Each shareholder is entitled to one vote for each share of stock held by him and in most states what is called the **"cumulative" plan of voting** prevails, that is if a stockholder holds ten shares and ten directors are to be elected, he can vote his ten shares for the ten directors, giving ten votes to each, or he can cast one hundred votes for one director. This plan was probably devised to enable minority stockholders to obtain a representation in the board of directors. So if ten directors are to be elected, the minority stockholders by combining may elect two or more directors and thus have a proportionate representation in the board of directors.

Corporations have the power, and it is their duty, to adopt by-laws which are simply rules for the conduct of their business and which generally define the duties of the officers and provide for meetings of the directors, or stockholders, transfer of shares and such other things as are deemed necessary. **A by-law differs from a resolution.** Every member of a corporation is conclusively presumed to know its by-laws, but outsiders are not presumed to have knowledge of the by-laws. **A by-law to be valid** must not be contrary to the charter, nor enlarge its powers, nor be contrary to the articles of incorporation, nor the statutes of the state, or the constitution of the state or the United States; must operate equally on the members, must not be inherently unjust, must not operate retrospectively, nor be unreasonable or oppressive. A by-law cannot be enacted, the effect of which is to do something against the policy of the law that an individual could not do, that is, the act cannot be in restraint of trade, nor can it prohibit a stockholder from transferring his stock, nor release him from the obligation of paying for his stock.

The amount of the capital stock of a corporation is fixed by

its articles of association or charter, and this stock cannot be increased or diminished without complying with the formalities required by law. The statutes of the state generally provide that stock can be increased or diminished. **Stock must always be paid for, either in property or money,** and no corporation has the right to issue stock without receiving full payment therefor, and if stock is sold by the corporation for less than its par value, the purchaser is liable for the payment of the balance.

When it is proposed to organize a corporation, the persons agreeing to take stock are called **"subscribers"** and they are bound to pay for the stock subscribed for by them.

The assets of a corporation constitute a trust fund for its creditors and hence the law does not permit the organization of corporations unless the stock is fully paid for. **The directors have no power to fix the price of shares** and if property is given for stock its reasonable value must be equal to the face or par value of the stock. As a rule also a corporation cannot take a note from the subscriber for the amount of his stock. Sometimes under the laws of the state the stock must be all subscribed and paid for in money, while in other states only a certain proportion of the stock need be paid up at the beginning and the balance can be paid for as required by the corporation. **After the stock is once paid up,** unless the stockholders unanimously consent, no further payments can be required of the stockholders, but, in accordance with the law, the capital stock can be increased in order to provide the necessary funds for carrying on the business. **Where stock is not fully paid for,** but only in part and the balance is to be paid for as calls or assessments are made, the stock may be forfeited for non-payment of the balance due, or of the assessment or call when made, but this power to forfeit must be conferred by statute of the state where the corporation is organized, or by some provision in the articles of association to which the stockholder has consented, and the power can only be exercised for the benefit of the corporation and must be carried into effect by compliance with all the forms of law

required, as by notice or other procedure, and the call must be regularly made. A valid forfeiture releases the liability of the stockholder as to creditors, and if the stock is sold for more than enough to pay the balance due, the excess must be returned to the stockholder. If shares of stock are forfeited they may be resold.

The certificates of stock issued by a corporation are not property in themselves, but only evidence that the holder is entitled to so many shares of the stock as shown by the books of the company. **Transfer of stock** is made by making the proper record on the books of the company, when the certificate with proper assignment and authority for making the transfer endorsed on the back of the certificate is surrendered, it is then cancelled and a new certificate issued to the new owner of the stock. The **books of the corporation** kept for the purpose of registering transfers of stock are called the **"transfer books,"** and on the back of a certificate of stock is usually a blank form for executing an assignment and direction to the company to make the proper transfer by the act of the person designated for the purpose. Sometimes this transfer of a certificate of stock is executed in blank, that is without naming any person as assignee, and the certificate passes by delivery, and in such case the books of the company may show that a person is owner of the stock when in fact it has been sold and is held by another person. Complications of law may result from this failure on the part of the purchaser of the stock to see that it is properly transferred, as stock in a corporation may be seized on execution by a creditor of the former owner.

There may be two kinds of stock in a corporation, "preferred" and "common." Preferred stock is merely a pledge to a specified extent of any profits the corporation may earn in favor of certain shares in preference to the others. In other words, if a corporation has one-half of its stock issued as preferred and one-half as common, the preferred stock generally provides that out of the profits of the company a certain annual percentage, or dividend, say seven per cent shall first be paid to the holders of the preferred stock and the remainder of the

profits, or such portion as may be determined by the directors, be paid in dividends to the holders of the common stock. Sometimes the preferred stock provides that the dividends shall be a guaranteed percentage cumulative, that is if the stock is to receive seven per cent annual dividend and some one year the corporation does not earn enough to pay the dividend, the agreed dividend becomes an indebtedness of the corporation, which is to be paid later in addition to the dividends for subsequent years. Preferred stock may provide that in case of dissolution of the company, when its assets are distributed, the preferred stock shall be paid in full before the holders of the common stock are paid. It may be possible for the common stock to receive a larger dividend than the preferred stock, because, after the agreed dividend on the preferred stock is paid, there may be sufficient left to pay a larger dividend on the common stock. No corporation has power to issue preferred stock unless it is given by law, or by the unanimous consent of all the stockholders.

Sometimes both preferred and common stock is registered by a transfer agent, as for example, in order to prevent an over issue of the capital stock of a corporation it is provided that a certificate of stock, to be valid must be countersigned and registered by a trust company known as a "transfer agent," and if the preferred stock is registered in this way the dividends are paid by the transfer agent or company by check to the order of the registered holder.

It is a question whether **a guarantee of a dividend** by a corporation on its preferred stock is equivalent to an agreement to pay annual interest on the shares at a specified amount, and hence becomes a debt, or whether it is simply equivalent to an agreement to pay the specified dividend on the stock before any profits are divided among the holders of the common stock. The answer to this question depends upon the provisions in the charter or articles of association in regard to these dividends.

The profits made by a corporation are generally divided among the stockholders in the shape of "dividends." Sometimes all of

the profits of any one year are not divided up in dividends, but a portion is reserved for emergency called **"surplus".** Nice questions arise in regard to rights of the holders of stock **when the stock is held by a person for life only;** such a person ought to be entitled to his proportionate share of the net earnings of the company and if say one-half the earnings are reserved for a surplus during a term of years so that the stock becomes intrinsically perhaps twice as valuable, the person who takes the stock after the life tenant is dead would not only get the stock but part of the earnings to which the life tenant was entitled. Such questions are purely legal and no general statement can be made in regard to the right of such holders of the stock.

The affairs of a corporation are managed by a board of directors, selected by the stockholders at the annual meeting of the corporation. Sometimes when a corporation is organized it is agreed who shall be the directors for the first year. The general rule is that the board of directors represent the corporation and have general power to manage its affairs under the by-laws. If the charter limits their powers they cannot enlarge them by the enactment of by-laws. Directors cannot make or amend the by-laws of a corporation unless authorized by statute; they cannot agree to the act of an officer in converting funds of the corporation to his own use; they cannot make promissory notes for the accommodation of outsiders; they cannot delegate all their powers of management to an executive committee; they cannot sell the corporate assets and business and put an end to its business unless authorized by the stockholders, but they may transfer the property of the corporation in the ordinary course of business and may pledge, mortgage and convey the property of the corporation to secure debts and generally may make an assignment of all the assets of the corporation for the benefit of its creditors; they may borrow money for ordinary corporate purposes and employ suitable agents and pay them proper compensation.

Ordinarily the directors of a corporation must be stockholders and are presumed to serve without salary. Still a corporation

may pay the directors compensation for special services, or even for acting as directors, if the power is given by a meeting of the stockholders; they must always act in good faith. **Ordinarily a majority of the directors constitute a quorum. The directors must act as a body at a meeting and cannot act as individuals. While a stockholders' meeting must be held in the state where the corporation is organized, meetings of the directors may be held wherever the directors agree to meet but such meetings must be by unanimous consent. Notice of directors meetings** must be given if required by the by-laws, and ordinarily if one director is not notified of the meeting, the transactions at such meeting are illegal. Adjourned meetings of the board are special meetings and members not present when the adjournment was ordered must be notified.

Directors are bound to use the utmost good faith and cannot vote upon a matter affecting their own private interest; they cannot secure to themselves an advantage not open to all shareholders and must account to the corporation for secret profits acquired through breach of trust. This rule applies to secret profits. The directors cannot employ the funds of a corporation to buy their own shares and the promoters of a corporation cannot by collusion make secret profits at the expense of the corporation; they cannot buy up claims against the company at a discount and then collect the full amount; they cannot pay their individual debts with corporate funds.

Directors however may contract with a corporation in good faith, but full and fair disclosure must be made of all facts and circumstances and their contracts are closely scrutinized by the courts and no director can vote on his own proposition if his vote is necessary to authorize the transaction.

Stockholders have the right to inspect the books and papers of a corporation at all proper times and can make copies and extracts from the books, or employ experts for the examination of the books and this right of the stockholders will be enforced by the courts.

There is a sort of corporation called **"joint stock company"** which is a combining of a number of persons to contribute a

specified fund for the transaction of business, such capital being divided into shares of which each member possesses one or more and which are transferable by the owner. **They partake of the nature of a partnership and also of the nature of a corporation.** They both enjoy what is called "perpetual succession," so that a transfer by a member of his shares introduces a stranger into membership and such transfer does not work a dissolution of the body and they both act through the agency of a board of directors, or trustees. **The members of a corporation are not liable for its debts** except under special circumstances, but the members of a joint stock company may be liable as partners, except where the statute otherwise provides.

Every corporation has the following powers:—

First, to have succession by its corporate name for the period limited in its charter, and sometimes if no period is limited, for an indefinite period or number of years specified by statute. Perpetual succession means that the stockholders may transfer their stock or if they die their stock may be distributed or sold and the new stockholders continually succeed each other so that the stock of the corporation is always outstanding.

Second, to sue and be sued by the corporate name.

Third, to make and use a corporate seal.

Fourth, to hold such property as the laws of the state authorize, and acquire such other property as may be necessary or proper for the business of such corporation.

Fifth, to appoint such subordinate officers and agents as the business of the corporation requires.

Sixth, to make by-laws, not inconsistent with the charter or laws of the state.

Seventh, to increase or diminish by vote of its stockholders, the number of directors or trustees who are to manage its affairs.

No corporation has the power to transact any business not authorized by its charter or the laws of the state, but it may

do all incidental things necessary and proper for the transaction of its business.

A corporation has the power to borrow money for the purpose of carrying on its business and unless forbidden by law can issue the usual evidences of indebtedness among which are notes and bonds.

A corporation generally has the power to issue bonds on the authority of its board of directors or stockholders, and may sell its bonds at less than their par value. Sometimes the law limits the power of a corporation to issue bonds, by providing that bonds shall not be issued to an amount in excess of a certain proportion of the corporate stock. A corporation may pledge its bonds for its indebtedness. Such bonds are negotiable and may be either registered or coupon; in the one case the interest is paid to the registered holders and in the other it is payable on surrender of the coupons. In determining the validity of bonds issued by a corporation, resort must be had to the statutes of the state, the charter of the corporation its by-laws and its records, showing how and when and by whom the issue was authorized. Generally in offering an issue of bonds to the public, a corporation furnishes proof of the lawfulness of the issue and an opinion of counsel thereon and the bonds are sold on the strength of the opinion of the expert, who advises as to whether or not the bonds are legally issued. The same rule applies to the securities issued by a municipal corporation. **Corporations have the right to secure their bonds by a pledge of personal property by way of chattel mortgage, or may mortgage their real estate.** At the present time series of bonds have been issued by industrial and railroad and public service corporations, which are called, first mortgage bonds, second mortgage bonds, etc. These bonds are secured by first, second or third mortgages and in case of default on the first mortgage, if the property is sold out under it the security of the subsequent mortgages is wiped out. Sometimes a corporation issues what is called "debenture bonds," which are nothing more than formal evidences of indebtedness generally secured by the deposit of securities with a trustee.

It is common also for railroads to buy equipment on the installment plan and to give a mortgage on such new equipment to secure the payment of the installments of the purchase price. These notes given by a railroad company are secured by an instrument in the nature of a chattel mortgage, whereby the title to property rests in a trustee until the notes are paid. Such securities are often called **"car trust certificates".**

A corporation while it has no real personality, can still through its agents and employees be guilty of wrongdoing and the corporation itself, as well as its agents individually, may be liable for such wrongdoing. In other words individuals and corporations are very much on the same footing as to their liability for the wrongful acts of their agents, but the corporation is only liable for wrongful acts committed by the agent while acting in the performance of the duties of his employment and this is true although the agent or servant may have exceeded his orders or acted without or against orders. Thus a railroad corporation is liable for damages to a person injured by its trains, or by the wrongful or negligent acts of its employees. Wherever a corporation undertakes the performance of a duty, the confidence insured by that undertaking creates a duty to exercise proper care in its performance, so a corporation operating works of public utility as bridge, railway and ferry companies, or companies operating water-works, gas or electric light works are liable in damages to any person who was injured while making a lawful use of such works because of the negligence of its employees or agents or because of its negligence in failing to keep such works in reasonable repair.

At the present time there are many statutes in force in the different states regarding **combinations in restraint of trade or trusts.** Statutes of the United States prohibit certain acts on the part of railroads, such as giving rebates, and the corporations are civilly liable for violation of these laws and in some cases the officers who have caused such violation are also personally liable.

A corporation may be dissolved by the expiration of the terms of existence granted by its charter, or by the general statute

when it is organized under a general law, or it may be dissolved by a repeal of a special charter when authority for such revocation has been reserved, or by a surrender of its charter, or by a forfeiture of its charter because of a violation of law after judicial proceedings for the purpose of obtaining such forfeiture have been instituted.

If the charter of a corporation and the laws of the state fix no **period of limitation** for the life of the corporation, it continues indefinitely. Some institutions that are incorporated, like life insurance companies, educational or charitable organizations, have **perpetual existence** from the very nature of their business or function. In some states upon the expiration of the charter, **the directors become trustees** to wind up its affairs, or a trustee may be appointed by the court for that purpose. When a corporation dissolves, or its period of existence expires, the corporation, figuratively speaking, dies.

CHAPTER XIII.

COURTS.

UNDER the constitution of the United States, as well as the constitutions of the several states, there are **three branches of government, legislative, judicial and executive. A constitution is the fundamental compact adopted by the people for their government and which regulates the functions of the three branches of such government.** The **legislature** is charged with the duty of enacting laws not inconsistent with the constitution. **The executive officers** are charged with the duty of administering and executing the law, while **the judicial function is exercised by the courts. A court is one or more persons appointed or elected to administer justice and construe the law.** There are a great many different courts in every state, commencing with **justice courts,** where an officer called **"justice of the peace,"** holds a court for the settlement and determination of petty disputes and with a limited jurisdiction. He has an officer called a **"constable,"** who executes the process issued by the justice. **Circuit, or district, courts** are courts exercising what is called "common law jurisdiction" in general matters, and are composed of one or more judges, with a clerk to record the proceedings, from which fact it is called a **"court of record,"** and an officer called the **"sheriff,"** whose duty it is to maintain order in the courtroom during the sessions of court and to execute the process of such court. **Probate, surrogate or orphans' courts** have jurisdiction in the proof of wills, adminstration of estates and appointment of guardians for minors and insane persons. Then come **courts of appeal,** to which any litigant, considering himself aggrieved by the judgment of the lower court, may appeal and have the proceedings of the lower court reviewed by the appellate tribunal. In some states the highest court is called the **"Supreme Court,"** in others **"Court of Appeals,"** and is the court of final resort charged with the duty of hearing appeals, superintending the inferior courts and construing the laws of the state. These appellate courts in determining cases write opinions which are published and called reports and which are regarded as law.

COURTS

There are **federal tribunals** existing under the laws of the United States, which consist of a district court, analogous to the state, circuit, or district courts, by whom certain controversies are determined; courts of appeal and the Supreme Court of the United States which is charged with the duty of superintending the inferior courts and is the final tribunal to determine constitutional and such other questions which may come before it. The federal appellate courts also render written decisions which are published and also called reports.

It is not necessary to enter more fully into a discussion of the jurisdiction of the courts. The trial courts are assisted in the administration of justice by a **jury,** ordinarily composed of twelve men who hear the evidence and determine questions of fact, under the direction of the court which declares the law. Every citizen, except those who are exempted because of partly public occupation and are within certain limits of age, are subject to be called upon to serve as jurors.

Attorneys are officers of the court, licensed as such under state statutes and subject to punishment for breach of duty.

CHAPTER XIV.

DAMAGES.

IT is a well settled doctrine of the law that every man must use his property in a way so as to not injure that of another or interfere with its enjoyment. The law also holds every person responsible for acts of negligence or fraud, by which another is damaged. From these principles, it follows that if anyone is injured or defrauded by the negligent acts, or fraudulent conduct, of another, the person guilty of the wrong must compensate the sufferer by payment of what is called "damages." While the law generally allows damages for the violation of civil rights, not every civil right that is invaded is entitled to compensation. The law has a maxim, "damnum absque injuria," which means that although there may be an injury, it does not follow that the person injured can recover damages, as for example, if a cemetery is extended up to adjacent property which may result in a deterioration of such adjacent property, the owner cannot recover damages. Sometimes where no actual damage may be sustained the law permits a recovery for what is called "nominal damages," and the mere fact that the precise nature and extent of the loss caused by the injury is not capable of being exactly established does not prevent the injured person from the recovery of nominal damages; hence it follows that in a suit for damages the recovery is often for only a cent or one dollar.

The subject is divided into two classes: general damages are such as the law implies as a natural and usual result of the injury complained of, special damages are the unusual losses which actually result from the injury, and not to be inferred as the necessary result, and some evidence must be given as to the extent of such losses in order to fix the amount of damages. Thus if a person is injured by being thrown from a street car, whereby his leg is broken because it had been started before the passenger has had time to alight, he can recover damages for pain and suffering, but if he desires to recover for any special damage such as loss of time, or expenses of a physician, some evidence must be given as to the extent and value of such losses or expenses.

Again damages are divided into what is called **"compensatory damages,"** which are the direct consequence of the act and will fully compensate the party injured for the losses sustained because of the injuries received, and what are called **"exemplary" or "punitive" damages,** which are given as a punishment for the wrong. Thus in an action of libel, if the publication has been malicious, the plaintiff can recover not only for the actual damage but also a sum in the nature of a punishment of the guilty party for such malicious act.

Where a party claims damages, either for a wrong, such as personal injury, or because of breach of a contract, he must not only show that the injury was sustained but also show with reasonable certainty the amount of the damages sustained in consequence thereof.

In an action for a **breach of contract** the damages are general and are such as will compensate the party whose contract has been violated for the loss he has suffered; for example, if a man agrees to sell another a number of horses at a certain price and then refuses to perform his contract he is liable to the other for damages which are measured by the difference in the price that the other party has to pay for horses to fill the contract, and the agreed price, if the price since the contract was made has increased.

In actions for injuries to the person, physical pain and mental suffering are always the subjects of compensation; so is fright, and disfigurement of the person and the humiliation and insult caused by a wilful act. While these injuries have no market value and their value cannot always be established with any degree of certainty, the jury usually is governed by a consideration of all the facts and circumstances shown in evidence and its ideas in regard to what will be compensatory, but the court always has the power to reduce an excessive verdict and diminish it if it believes that the damages allowed are excessive and unjust under the circumstances.

Loss of time and impairment of earning capacity are elements of damage both in actions for personal injury and for breach of contract. Sometimes if **loss of profits** can be shown such

loss will be taken into consideration in estimating the damage, but **mere speculative profits will not be allowed,** but only such profits, in case of breach of contract, as were supposedly within the intent of the parties at the time the contract was made. If a defendant by his wrongful act has maliciously destroyed the reputation or business credit of plaintiff, such business losses must be made good by the defendant, but no damages in any way will be allowed for injuries to an illegal business or for breach of an illegal contract.

A party can recover as damages **reasonable expenses** which he has incurred on account of the wrong or injury sustained, but this element of damages is looked upon by the courts with suspicion and must be clearly shown. In actions for the breach of a contract, the expenses which are the natural result of the breach of a contract can be recovered and all necessary expenses incurred by a party in complying with the terms of a contract which has been violated by the other party.

A man can recover damages for an injury to his wife, whereby he has been deprived of her society and service, but what seems to be apparently wrong is that a wife cannot recover damages for the loss of the society and companionship of her husband. A parent can recover damages for an injury to an infant child and in some states an executor or administrator can recover for the death of his testator.

The law will always in considering the compensation for injuries recognize the difference between an injury which is the result of accident and that which is willful, premeditated or accompanied by insult. In the latter case the jury is authorized not only to allow the actual damage, but punitive damages.

Damages may be allowed for the wrongful detention or seizure of property, or for a breach of a contract or agreement, or for injuries to property occasioned by the negligence of another.

Physicians and surgeons are liable for **"malpractice,"** which means their negligent acts in failing to exercise such care and skill as are ordinarily exercised under like circumstances by other physicians and surgeons of the same locality possessing average skill.

Interest is a sort of legal damage allowed for the wrongful detention of money as well as for its use or hire.

Sometimes in making a contract it is provided that if one party violate the contract, the other shall recover a specified amount as **"liquidated damages."** This means that it is agreed by the parties that if the contract is violated the person so violating the contract shall pay a specified sum as damages without further proof as to their amount. The courts do not always look with favor upon such an agreement and, if the amount fixed for liquidated damages seems to be unreasonable such sum will be considered to be in the nature of a penalty, and the courts will only allow the actual damage. The rule laid down for determining whether a contract for liquidated damages will be allowed to stand is that they will be allowed either where the damages are uncertain and not capable of being ascertained, or where from the nature of the case and the terms of the agreement it appears that the damages have been fairly calculated and adjusted and the amount is expressed in the contract.

Where an act has been done in good faith even though it may result in injury, there can be no recovery of examplary or punitive damages. The question always is whether the act was willful and wanton and if so the jury can award damages as a punishment.

There is **no liability for a wrongful act causing death unless right of recovery is given by statute.**

CHAPTER XV.

DESCENT AND DISTRIBUTION.

WHEN a man dies "intestate," that is without leaving a will, his property goes by operation of law to his heirs subject to the payment of his debts, and the allowances given by law to his widow such as dower or a year's support. In former times his real estate was not subject to the payment of debts, but statutes of the different states now provide that both real and personal property shall descend alike to his heirs subject to the payment of his debts.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his property by right of representation as his heir at law. Descents are of two kinds: "lineal," as from father or grandfather to son or grandson, and **"collateral,"** as from brother to brother, or cousin to cousin. Technically the term, "descent," applies only to the transmission of real estate, but it is now used to denote the course of transmission by operation of law of both real and personal property when the owner dies without a will, or his estate or any part thereof is taken as intestate estate. Transmission of real estate by devise, or of personal property by bequest under a will, is different from transmission by descent. Persons taking by descent take by mere operation of law, while those taking under a will are regarded as taking not by descent, but by what is called "purchase."

Distribution denotes the division of the personal property of an intestate after administration, or the payment of debts and expenses of administration, among the persons entitled as heirs, or nearest of kin, and while the widow is not strictly speaking an heir of her husband, or he of her, in many states she is entitled at her election to take a child's share of the estate, or if he dies without child or children, to one-half thereof and so he inherits from her to a like extent. In some states, as Louisiana, a man cannot dispose of his property by will to the exclusion of his heirs of more than a certain percentage; and in other states where the rule as to community property prevails he can only dispose by will of such property

as he had acquired before marriage and one-half of that acquired after marriage, he and his wife being deemed joint owners of all property acquired after marriage.

The rights of heirship become vested at the death of the intestate.

In some states if a man is convicted of crime he becomes what is called **"civilly dead,"** as where he is sentenced to imprisonment for life and in such cases his property descends as if he were dead.

In probably every state, statutes regulate the rights to a man's property after his death and specify how it shall descend. The statutes in force at the time of death of an intestate govern the disposition of the estate and the rights of inheritance of real estate always depend upon the laws of the state where such real estate is situated.

Usually the rights of descent and distribution of the property of an intestate are governed by the laws of his domicile or home. All property of every kind, rights, claim and interests which are certain, are subject to descent and distribution.

The words "next of kin" denote the persons next of kindred to the deceased, that is those who are most nearly related to him by blood, but generally the rights of inheritance are defined by the statutes of the state. Technically the words only include blood relatives. The **"ancestor"** means anyone from whom an estate is inherited. **Degrees of kindred** are determined by the statutes of the state, either where the deceased died, or in the case of real estate, where it is situated. The degree of relationship is ascertained by counting up the line to the common ancestor and then down to the heir. At common law collateral kindred could not inherit if they were of the **half blood** only, but at the present time the statutes give the half blood the right of inheritance, although sometimes they only take one-half as much as kindred by the whole blood. If a person dies intestate leaving real estate it goes to his **legal heirs.** This term means **children** or **children's children,** but does not include collaterals, hence a husband is not the descendant of his wife. It makes no difference whether the children of the man are by one wife or

several, and a child born after a man's death takes equally with those who were living at the time of his death.

The general rule of descent and distribution is that if any person having title to any real or personal estate undisposed of by will, or otherwise limited by marriage settlement, shall die intestate, it shall be distributed to his kindred, male or female, subject to the payment of his debts and the widow's dower, first to his children or their descendants in equal parts; if there be no children or their descendants, then to his father, mother, brothers and sisters and their descendants in equal parts; if there be no children or their descendants, father, mother, brother or sister nor their descendants, then to the husband or wife, if there be no husband or wife then to the grandfather, grandmother, uncles and aunts, and their descendants in equal parts; if there be no children or their descendants, father, mother, brother, sister, or their descendants, husband or wife, grandfather, grandmother, uncles, aunts, nor their descendants, then to the great grandfather, great grandmother and their descendants in equal parts, and so on in other cases without end passing to the nearest lineal ancestors and their children and their descendants in equal parts.

Sometimes the statutes provide that **if there be no kindred of a man on his father's or mother's side capable of inheriting, the whole shall go to the kindred of the wife or husband** in like course as if such wife or husband had survived the intestate and then died entitled to the estate. The statutes generally provide that where there are several lineal descendants all of equal degree of consanguinity to the intestate, or his father, mother, brothers and sisters, or his grandfather, grandmother, uncles and aunts, come into title to an estate, they shall take by persons, or **"per capita,"** but where a part of them are dead and part living and the issue of those who are dead have a right to partition of the estate, such issue shall take **"per stirpes,"** that is the share of the desceased parent. **Per capita means taking as individuals, while per stirpes means the taking by class,** that is if a man is deceased, when if he were living he would have been entitled to a share in an estate, and he

leaves a number of children, these children take the share of the deceased parent, and if there are grandchildren they take the share of the parent as a class no matter how many there be.

In some states if a wife dies after a child is born, her husband has what is called an **"estate by the curtesy,"** that is the use of the wife's real estate during his life and he is entitled absolutely to all her personal property. The rights of husband and wife in the property of each other are now generally specified by statute and estates by the curtesy in some states is abolished.

An **"advancement"** is a regular giving of money or property to a child by a parent in anticipation of death and in the distribution of an estate such advancement must be deducted from the child's share, but it must be clear that the parent intended the property as an advancement, otherwise it is considered a gift. Where there have been advancements to children by a parent, upon his death the advancements are considered part of the estate, which is called bringing them into "hotchpot." Advancements do not bear interest until after the death of the ancestor.

A bastard can only inherit from his mother and if he leaves property but no descendants his mother will inherit.

An adopted child is considered the same as a lawful child, so far as inheritance is concerned, but if such adopted child die in the lifetime of the person adopting him, his heirs will have no share in the estate of the foster parent. On the other hand, the heirs of the foster parent cannot inherit from an adopted child, but his property goes to his own heirs without regard to the adoption.

To determine the rights of inheritance, resort must always be had to the laws of the State and it is difficult, if not impossible, to lay down any rules which will be of universal application.

CHAPTER XVI.

DOWER.

BY the common law of England a wife upon the death of her husband, was entitled to use for the term of her natural life of one-third of the lands of her husband. This was called "dower." In modern times the term is applied not only to the interest given a widow in the lands of her husband, but also to her interest in the personal property as well. In every state **the right of dower is recognized by law** and the word is used to denote the interest which a widow has in the property of her husband after his decease. This interest varies in different states and its extent will generally depend upon the number of children that are left. The object of the law in allowing dower is to furnish means of support for the wife and for the nurture and education of minor children and dower has always been considered a sacred right to be guarded and protected by the courts. Hence **a widow cannot be deprived of dower by the will of her husband,** nor can creditors deprive her of such right, but dower remains unless she herself has parted with it by her voluntary act, such as joining in a deed of the property, or signing a mortgage, and she can claim her dower and take what the law gives her. A woman can also deprive herself of dower by entering into a contract with her intended husband before marriage by which for a consideration she releases her right of dower in any property that he may then have or thereafter acquire. Such a contract is called a "marriage settlement," and if properly executed and recorded bars the wife of dower, if it so provides.

The common law right of dower only extended to **a life estate in one-third of the lands of her husband,** but in most states the statutes give a widow **an absolute right to a certain amount of money,** exclusive of the claims of creditors, and also, at her election, **a child's share** in the estate, or if there are no children, a specified interest, usually one-half. Sometimes she is allowed in addition an allowance for a year's support. The absolute dower for example in some states is $400, and

the allowance for a year's support of herself and minor children is allowed to the widow in proportion to her needs and size of the estate, although nothing may be left for creditors.

If she takes a child's interest its extent or value may depend upon what is left of the estate after payment of debts and expenses, but if she so elects she can claim her dower independent of creditors and stand upon her legal rights.

In former times the husband had the use of the lands of a wife during his life in case a child had been born of the marriage called an **"estate by the curtesy,"** and in most of the states the statutes give a husband the same rights in the estate of his wife as the wife has in the estate of her husband.

Legally speaking three things are necessary to make complete a widow's right of dower. The first is a **valid marriage,** the second is **possession by the husband of the land** in which she is to have dower, and third the **death of the husband.** Before the death of the husband the right of dower is called **"inchoate,"** but does not ripen until after the death. If her marriage is absolutely null and void, as for example, if the man had another wife living at the time she can claim no dower because such a marriage is absolutely null and void. A widow has no right of dower in land which is held by her husband in trust and there must be a possession of the husband of the land, or what is called his "seizin." Dower is allowed in all kinds of lands and tenements, but not in what is called an **"incorporeal" right,** or **"easement,"** which is a right under a license to pass over the property of another, as for example to a spring, nor is there any right of dower in a burial lot. A widow has no right of dower in real estate purchased by a partnership with partnership funds and held by it for its own use. A widow can claim dower as against a mortgage which she has not signed, but not as against a mortgage given for purchase money, and when a woman marries a man who has lands that have already been encumbered by a mortgage, such land is subject to the payment of the mortgage before the widow can claim any dower.

That statutes of all the states provide how **inchoate dower**

can be conveyed, as by a wife joining in a deed or mortgage, and also how dower can be set off to the widow.

A divorce deprives a wife of her right of dower, whether procured by him or her. Sometimes, however, the laws of the state provide that if a woman obtains a divorce for the misconduct of her husband her dower shall remain. A wife can have no dower in lands acquired by her husband subsequent to a divorce and a wife living in adultery is generally barred of dower. Although a widow may marry again, she is not cut off from her dower in the estate of her first husband.

It is customary when land which is in the name of the husband is sold for the wife to join in the deed and such joining cuts off her dower, but if the law imposes any formalities, such as a private examination by the officer taking the acknowledgment separate and apart from her husband, such formalities must be complied with or else dower will not be released.

The methods by which a widow can recover dower in the lands of her husband, or in his estate, are usually regulated by statute and her right is generally established in courts of probate jurisdiction, although different procedure is prescribed in the various states.

Often **dower is assigned in particular lands** and when the widow enters upon such lands she has a life estate therein which is absolute and she cannot be compelled to sell it but she can act in regard to it as any life tenant can with his life estate. Her estate is not dependent upon her continued occupancy of the lands. Crops growing on the lands at the time of the assignment of dower will pass to the widow. A widow, like any other tenant for life, is liable to the heirs or the persons entitled to the land after her death for any waste of such property, such as cutting off the trees. A widow may cut and take from the dower lands her fire wood and timber necessary for repairs to building and fences, but she cannot sell off the timber. Sometimes she may be liable for failure to repair the buildings. She may work any mines on the

premises. She is liable for taxes assessed on her dower lands.

The widow's death ends her dower in lands or personal property except those which she has taken absolutely.

CHAPTER XVII.

EXEMPTIONS.

IN former times when a judgment was rendered against a man any and all of his property might be seized by the sheriff and sold to pay the debt, and even himself put in prison. Even his wearing apparel might be taken, provided the sheriff was not obliged to take it off of the debtor's back, but in modern times, from reasons of public policy and in order that a man may not be deprived of the means of supporting his family, a certain amount of property, or certain articles of household furniture, or implements of his trade, are **exempted from seizure under an execution.** Under the laws of all the states a debtor may hold property to a specified value exempt from any claims of his creditors. If a man is married, or is the head of a family, the exemption is greater than that allowed to an unmarried man.

The dwelling, or homestead, of a married man, or head of a family, is also exempt from execution, and we will consider the subject of homesteads under that title.

Exemption laws have no extraterritorial force. They form part of the remedies for collection of debts and exemption is a personal privilege, and not a right, and is governed by the law of the place where the judgment is sought to be enforced. Sometimes a man may lose his right to an exemption by attempting to remove his property out of the state.

The law of exemptions rests on statute alone and no debtor can claim any exemptions that are not allowed by the laws of the state of his residence. All such statutes are construed liberally and generally an officer levying an execution is required to notify the debtor of his rights of exemption. **The right of exemption is personal** and only the owner of property can exercise it, although often a wife in the absence of her husband can make claim to the exemptions allowed him by law. **No exemption** is allowed out of partnership property. Sometimes there is no exemption on a debt incurred for household necessaries, such as food, or for board or lodging. Sometimes no property is exempt from a claim of a laborer or ser-

vant for wages, and there is no exemption on an execution on a judgment for debts due the government such as taxes.

The statutes generally provide that **certain property shall be exempt when owned by the head of the family. The primary meaning of the word "family," is husband and wife and children,** but under a liberal interpretation it is deemed to include all the persons living together in one house as a family. A man with whom several relatives live who are supported by him may be a head of the family although he is unmarried. There must be a dependence on the part of the other members of the family upon the head and either a legal or moral obligation on his part to support them. **The husband, and not the wife, is the head of the family,** but a widower or widow may sustain such relation. Although a wife obtain a divorce with the custody of the children if the husband still continues to support the children he may be the head of the family. A person who moves into a state with his family and personal property with the intention of living there is a resident of the state and entitled to his exemption, but if he has absconded or attempted to remove his property from the state of his former residence, he may lose his rights under the laws of the state of his first residence.

The statutes generally specify what property shall be exempt; for example, a certain number of work animals, cows, sheep hogs and implements of agriculture, as well as certain articles of household furniture, are allowed to a farmer. Tools and his implements of trade are allowed to a mechanic. The library and instruments of a professional man are exempt. Certain supplies of food articles and animals furnishing food are exempt and wearing apparel of a man and his family are included in the exemptions. **The wages of a man are usually exempt,** or, if not entirely exempt, only a certain percentage can be taken on execution. This term "wages," generally means the compensation received from manual labor and does not include what is generally meant by the words "salary."

The salary of public officers is exempt because of reasons of public policy, and in many states life insurance policies, or the

money received from fraternal beneficiary associations, is exempt and cannot be taken in payment of the debts of the deceased or the beneficiaries.

Under the statutes of the United States pension and bounty money is exempt as well as the property purchased with it.

From motives of public policy **a man generally cannot contract in advance to waive, or agree not to assert a claim to, the exemptions allowed by law,** although if his property is seized on execution he may refuse to assert his right. Often it is provided by law that if the husband fails to set up the right his wife may do it for him or in her own right claim the benefit of the law.

CHAPTER XVIII.

GARNISHMENT AND EXECUTION.

AFTER a judgment has been obtained against a debtor, it is usual for a writ, called an "execution," to be issued directed to the sheriff commanding him to seize any property of the debtor which he can find with which to satisfy the judgment. When the sheriff seizes any property under such a writ, it is called making a "levy." Often some other person has in his possession, or under his control, property belonging to the judgment debtor, or owes him money, in which case the sheriff serves on such person, who is called the "garnishee," a summons called a "writ of garnishment," commanding him to come into court and tell what property he has, if any, in his possession or under his control belonging to the debtor, or state how he is indebted to such debtor, and when the answer is filed if the garnishee admits having property of the debtor, or that he owes him money, the court directs him to deliver it, or pay the money over, to the sheriff.

In different states different names are applied to the last named process. In some states it is called "trustee process," in others "factorizing process" or "attachment execution." The right only exists because of the statutes of the state and they always prescribe the form of the proceedings and the procedure necessary to charge the garnishee.

Generally there must be a judgment against the original debtor and it must be a final judgment and be for money. No person can have the right of garnishment except the judgment creditor and the same rights of exemption lie against the writ of garnishment as in the case of an execution. The garnishee cannot be held liable unless at the time the proceedings are instituted, he either owes the defendant or has property belonging to him under his control. If payment of the debt has been made before the writ is served, there is no right of garnishment. The writ lies against persons and corporations, but not against a city, or state, or the United States, because of reasons of public policy. A trustee cannot be garnished by a

creditor of the beneficiary of the trust, and the rule is that under no circumstances can a garnishee be placed in a worse condition than he would have been had the defendant brought suit directly against him. If the demand which the debtor has against a party is not payable in money but in a commodity or goods this sort of debt cannot be garnished. Whatever is exempted by law from execution is exempted from garnishment, such as life insurance.

The **procedure of garnishment** is regulated by law and in claiming the process all the requirements of the statute must be observed.

CHAPTER XIX.

HOMESTEAD.

IN ancient times no mercy was shown to an unfortunate debtor. All his property was liable to be seized and often he himself was imprisoned, but **in modern times, in order to enable a man to maintain a home** where his family may be sheltered and he and they be relieved from the possibility of being stripped of such a refuge, **the law gives every head of a family the right to retain the family residence, or dwelling house,** and everything connected therewith which is necessary for its more perfect enjoyment, such as barns, outhouses and gardens, or land, within a certain value, as a **"homestead,"** which cannot be taken away from him by process of law. In the country it is usual for forty acres of land, together with the dwelling house and in cities, or towns, a dwelling not exceeding a certain amount in value to be set off to, or claimed as a homestead, by the debtor. **The right depends entirely upon statute** and does not exist unless the law gives it, but it is believed that homestead exemption laws have been enacted in every state of the Union. Not only is a man entitled to exemption during his life, but after his death **his wife and minor children are entitled to the home,** the widow during her life and the children during minority. **All homestead laws must be liberally construed** in favor of the debtor and apply to property acquired both before and after their passage, and when rights to a homestead have once been secured by the person entitled thereto, the right cannot be taken away by the legislature. The value and extent of the homestead is determined by the law in force when the debt was created, but homestead rights of a widow and children are determined by the law in force at the time of the death of the husband or parent. No one can have more than one homestead.

Under the laws of the various states **only a family is entitled to a homestead** and such right is confined to a head of the family. The law is liberal in determining what persons constitute a family. It may be composed not only of a father,

mother and children, but also of a father, or grandfather, or grandchildren or brother and sister. Even an unmarried man and his illegitimate offspring may be entitled to a homestead. By "head of a family" is meant a man or woman with whom reside persons dependent upon him, or her, for support, or those whom he or she is under a moral or legal obligation to support. It does not include the hired servants or boarders. **Every person is the head of a family who keeps house and has living with him persons whom he is supporting because of some legal or moral duty.** The fact that the person claiming a homestead is unmarried does not deprive him of the exemption if he is supporting as members of his family relatives or dependent persons.

Homestead laws are for the benefit of residents of the state and therefore a non-resident cannot claim the exemption of a homestead although if a person is a citizen of a state it does not require him to remain permanently within the jurisdiction provided the premises is his usual home. It is necessary that the person claiming a homestead right be actually an occupant of the premises and such premises must be occupied in good faith. A man may even use the premises occupied by him as a hotel and yet it be his homestead.

Generally **the law provides a method of setting-off a homestead** and all directions of the statute in regard to setting apart a homestead must be followed. Rents and profits arising from the homestead, so long as it remains such, are exempt because the person entitled to the homestead may not only occupy it himself but, if he so desires, use it for purposes of profit. Under some circumstances **a homestead may be disposed of** and the proceeds used for the purchase of another.

This right cannot be claimed in partnership property as against partnership creditors, but a husband is entitled to a homestead in property the title to which is in his wife's name but for which he has paid. In states where the husband and wife hold in common what is called "community property," the homestead remains but the right does not exist in property held by a man in trust.

Homesteads are not exempt from taxes, nor from a liability for a mortgage executed by the parties entitled thereto, nor can a homestead be claimed as against an obligation incurred for purchase money.

A homestead is exempt from seizure under judgments against its owner and liability after his decease to be appropriated for the payment of the expenses of the last illness and funeral.

The owner of a homestead may sell or mortgage it, but no mortgage of a homestead is valid unless the wife has joined in the conveyance. Sometimes, however, the law limits the right of the head of a family to transfer or encumber the homestead. It follows that if a homestead can be mortgaged or sold it may be abandoned and one way of abandoning a homestead is to sell it. The head of a family cannot by will deprive his widow and children of the homestead even though it is the only property he may have at the time of his death, because it is the policy of the law that a man's family after his decease shall be protected by a home.

Under most statutes the **right to a homestead exists in the children of a widower** so long as they are minors, and during minority the children are incapable of waiving or abandoing their homestead rights but may enforce them even though they may be absent from the home place or have removed from the premises.

Generally, even though the title to property is in the wife, the homestead right after her death survives in favor of the husband. Under the statutes of some states there may be an allowance out of the estate of a deceased person in lieu of the homestead.

As has been said, **a homestead may be abandoned or the right lost,** sometimes by a dissolution of the family, or by removal from the homestead, but a removal for temporary purposes or for the education of children or account of health will not terminate the right if there is an intention to return. **A homestead right cannot be lost by an agreement in advance not to assert such right and neither husband nor wife can waive the right to the homestead of the other.** Even a conveyance of the

homestead absolutely or by way of mortgage cannot be made unless authorized, or at least not forbidden, by statute.

CHAPTER XX.

HUSBAND AND WIFE. MARRIAGE AND DIVORCE.

MARRIAGE. **The relation of husband and wife in law is created where a man and woman, who are not forbidden so to do, enter into a contract of marriage.** This contract is peculiar in that it cannot be dissolved at will by either party during the lifetime of the other, or by mutual consent. It is a relation existing for the benefit of society and the state and in every state laws exist providing who may enter into the relation, fixing the powers of the contracting parties and also providing that the marriage may be annulled or dissolved by proceedings for the purpose brought in the proper court. **Marriage is a civil contract requiring only the consent of parties capable of contracting and no religious ceremony is necessary, nor can ecclesiastical authority in any way control such relation. The legislature of each state is the only authority which has the power to regulate contracts of marriage,** fix the qualifications of the contracting parties and declare what forms or proceedings are necessary to constitute a marriage and what duties and obligations are created thereby and how the relation may be dissolved. **The validity of a marriage is determined by the place where it takes place.** For example, first cousins forbidden to marry by the law of their residence may go into a state where no such restrictions exist and there marry. **To constitute a valid marriage, it must be entered into with the consent of both parties** freely given and such consent may be expressed by a verbal or written contract, or by taking part in a ceremony. Fraud practiced by one party on the other, or a consent extorted by compulsion or threats of violence so as to terrorize the other party, makes the marriage voiadble at the option of the one deceived or imposed upon.

Males, if above the age of twenty-one, and females above the age of eighteen are free to contract marriage, unless they are related within the forbidden degrees of consanguinity. **Statutes regulate what degrees of consanguinity shall prevent marriage.** Usually where a minor contracts marriage the con-

sent of the parent or guardian is required, but a marriage without such consent is not void although it may be annulled afterwards by the proper proceeding by the minor after attaining majority, or acting by a guardian, but if the parties continue to live together after the minor has reached majority it will be deemed that such marriage is ratified.

What is called a **"common law marriage"** is where a man and woman, instead of having a ceremony performed, agree with each other to sustain the relation of husband and wife and live together in pursuance of that agreement, holding each other out to the world as sustaining such relation. Such a marriage is valid unless expressly forbidden by statute.

In most every state, for reasons of public policy, it is provided that **persons desiring to contract marriage must obtain a license from the proper authority,** and penalties are imposed upon officers or ministers performing a marriage ceremony without such license. If a marriage is celebrated without a license it is not void but only subjects the official performing the ceremony, or sometimes the parties, to penalties if such penalties are imposed by law.

A contract of marriage is of no validity if either of the parties is insane, unless the contract is made in a lucid interval. What constitutes mental capacity to an extent sufficient to avoid a marriage depends upon the particular circumstances of each case. **Marriage between parties closely related by blood, as between a brother and sister, or in some states, first cousins, or within certain other degrees of blood relationship are void.** So the law often declares void a marriage between persons of different races as between a white person and a negro. A marriage between parties either of whom has living at the time another husband or wife from whom he or she has not been divorced is absolutely void. No license unless one is required by law is necessary for a marriage. Such license, if required by law, must be issued by the proper officer who is liable for a wrongful issuance of the same and if a notice is required, as by publication of the banns or intention to be married, the

parties must comply with such law or they may be subjected to a penalty.

The statutes generally provide **by whom a marriage may be solemnized** and generally it must be solemnized by some clergyman, regularly ordained and settled in the work of the ministry; or be performed by a civil magistrate such as a justice of the peace, mayor, or judge of a court. **No particular form of words is essential to a marriage** it being sufficient if in the presence of the officer or clergyman the parties agree to enter into the relation of husband and wife.

When a marriage is void no rights can be secured thereby and such marriage may be held void if attacked although the parties are dead. A marriage which is voidable only, that is one which will be set aside upon proper proceedings must be attacked during the life of the parties, but if the marriage is absolutely void it needs no legal proceeding to declare it so.

In some states all marriages are declared by law to be void which are not attended with certain formalities evidenced by record or other writing and marriage in such case without compliance with the required formalities is void, but, in the absence of such statutes, a marriage may be proved by anyone who saw the ceremony or even by the parties themselves or by the record, or, in the case of a common law marriage, by the testimony of parties to whom the man held out the woman as his wife. Generally a marriage may be established by the fact that a man and woman have openly lived together as husband and wife and treated each other as such, but of course such a presumption may be contradicted by direct evidence that the parties were never married.

A marriage that is voidable may be annulled by a proper proceeding in court for that purpose, or the parties may be divorced by an action brought in court by either. Laws sometimes provide that if either party is sentenced to life imprisonment for a felony such sentence shall operate as a dissolution of the marriage but the parties cannot divorce themselves.

Divorce. From reasons of public policy the legislature of probably every state has provided that a marriage may be dis-

solved for certain causes specified in such statute. Sometimes, unless forbidden by the Constitution of the State, the legislature can pass an act dissolving a marriage. **Divorce is the legal dissolution of a marriage by a court or other lawful authority upon a proper proceeding brought for that purpose.** Two kinds of divorce were recognized by the common law, one which is called a divorce **"a mensa et thoro,"** which is a judicial separation from bed and board without a dissolution of the marriage, and divorce **"a vinculo,"** which means an absolute dissolution of the bonds of matrimony. **Suits for divorce must be brought in the proper court having jurisdiction and the statutes of the different states provide what courts shall have the authority to decree divorces and where the proceedings must be brought.** A suit for divorce must be brought in the place required by law, usually the place where one party resides, and generally it is provided by law that this residence must have continued for a certain period, as for example one year, and the statutes also provide upon what grounds marriage can be dissolved and what are sufficient causes for divorce. **These grounds for divorce are much the same in different states;** usually they are adultery by the opposite party, conviction of a crime, desertion for a specified period, acts of violence to such an extent as to injure the health or make the condition of the other intolerable, cruelty, concealment of previous unchastity, pregnancy by another man, or physical incapacity, or becoming an habitual drnkard, or common vagrant, or similar causes. At the present time there is a general disposition on the part of legislatures to limit the causes for divorce and make it more difficult to obtain. Whether or not a divorce will be granted depends upon the laws of the various states and legal advice should be taken in regard to the same. When a divorce is obtained without valid personal service it may not be recognized in the state where the opposite party resides.

Rights of Husband and Wife. Under the common law of England, upon which our law is based, **husband and wife were in its view but one person.** The legal existence of the wife was for most purposes suspended during her marriage, but modern

statutes have removed most, if not all, of the common law disabilities of married women so that at the present time she can act as if she were single. The law of the state where real estate is situated governs the rights of husband and wife therein but the law of the place where the couple reside determines the rights of the parties in personal property. The law in force at the time of the marriage determines the personal rights of the parties.

The husband is the head of the family and has the right to regulate the expenses of the household, determine who may be visitors and generally control its management. He has the right to select the family name and the wife by custom takes the surname of the husband. A fact not generally known is that, unless forbidden by statute, **a man may change his name at his pleasure,** providing it be not done for fraudulent purposes. **The husband is entitled to the custody of the children** and both husband and wife have the right to the society of each other and are bound to live together. A husband has the right to select the residence and it is the wife's duty to follow her husband to the domicile selected by him and her refusal to do so without reasonable cause constitutes desertion. A husband, however, cannot arbitrarily establish the residence in a place attended with personal danger, or is unhealthy to such an extent as to make it dangerous to health to reside there. It is the duty of the husband to support and maintain his wife and children and what constitutes such support depends upon his circumstances and condition in life. A husband however is not obliged to support his step-children. At common law the personal property and household furniture of the family belong to him and he can dispose of it at his pleasure.

The reciprocal rights and duties of husband and wife in modern times are practically fixed by statute which in most states has entirely removed the disabilities of the wife while still maintaining the obligations of the husband toward her. In most states she holds her property in her own right and can dispose of it as she chooses and has power to bind her hus-

band for the support of herself and children. These laws vary so that it is difficult if not impossible to make statements which will apply in every state. Wearing apparel of the wife and her jewels are in law called her "paraphernalia" and while her husband, except where the statute otherwise provides, can dispose of it at his pleasure during his life, in case of his death it does not pass to his administrator as other personal property nor can it be disposed of by his will but it belongs in such case absolutely to the wife. At common law a husband could take possession of his wife's personal property, which is called "reducing it to possession," but if he did not do so during his life the wife retains it.

Generally **the real estate of the husband** can only be sold or encumbered by the joint conveyance of himself and wife because of her dower interest. Statutes now provide in what manner deeds of real estate shall be executed by husband and wife. Before the statutes were passed relieving married women from their common law disabilites a wife could not execute a note or become security for her husband or anyone else, nor could husband and wife after marriage make contracts with each other. He was also liable for her debts contracted before marriage.

A wife can bind her husband, as has been before said, for the necessaries of life which include food, clothing, lodging, ordinary household supplies and expenses of sickness, but do not include extravagant or unreasonable purchases, and the court will always consider the station and means of a husband in determining to what extent she is authorized to incur debts on his account. The husband will be liable for the necessaries of his wife even though he is separated from her or may be of unsound mind. The husband, of course, being bound to support his wife, must provide her with the necessaries of life, medical attention in case of sickness and defray the expenses of her burial if she dies.

Sometimes before marriage is entered into between two people, they make an agreement that each shall retain his or her property free from any interest of the other, which is called

making **a "marriage settlement."** All kinds of property is the subject matter of such agreements and as a rule this kind of a contract is entered into for the purpose of either making provision for the wife's support in case of misfortune or securing to her the use of her separate property or limiting her interest in the property of her husband. These settlements must always be made before marriage and marriage constitutes the consideration of such a contract.

Husband and wife may make gifts to each other and in some states contract with each other the same as any other two persons. If a wife commit a crime in the presence of her husband she is generally not liable as it is presumed that she is impelled thereto by her husband and he becomes liable. Where the common law disabilities exist a wife cannot appoint an agent or convey property, but where the disabilities are removed she can do both and make any kind of a contract without her husband's consent except conveyance of land.

Even where the disabilities of married women do not exist **a woman may have a separate estate** which is to be controlled and managed according to her direction either because of a marriage settlement or by some conveyance to a trustee for her use free from any control of her husband. Ordinarily a wife's separate property, where the disabilities existed, was held and managed by a trustee for her benefit but in modern times whatever property a wife may have at the time of her marriage remains her own although under modern statutes the husband has an interest in the wife's lands in the nature of dower and she in his under the statutes of dower and distribution. Generally a wife is entitled to her own earnings as where for example she keeps boarders or engages in business and the creditors of the husband cannot subject such property to the payment of the husband's debts.

In some states a married woman can only sue or be sued when joined with her husband but such disability now is generally removed and the wife can be sued in the same manner as any other person. A husband may be liable for the wrongful acts of his wife as in case of slander or libel.

In some states, particularly those on the Pacific Coast and some of the Southern States, by law **all property acquired during marriage by the industry or labor of either husband or wife, or both, together with the increase thereof, belongs to both during the continuance of the marriage as tenants in common.** If two persons are married in a state and thereafter remove into another state where this law known as **"community law"** is in force, they become subject to the laws of the latter state. This community exists unless before marriage the man and woman have agreed that it shall not apply. What property the husband or wife had before marriage remains his or her separate property the right only extending to property acquired during the marriage. It necessarily follows that both must join in the sale of property but each can deal with the property owned at the time of the marriage without restraint except where the law limits the right.

CHAPTER XXI.

INFANTS.

THE law has fixed the time when boys become men and girls become women. Until such age is reached both boys and girls are called **"infants,"** afterwards they are **"adults."** In some states the age is the same for both sexes, namely twenty-one, while in others females reach the age of majority at eighteen.

The age of majority is attained on the day preceding the twenty-first or eighteenth anniversary of the person's birth, and the law of the place of the residence of the person determines his or her rights, but the place where a contract is made by a person determines whether the person making such contract is an infant.

Infants have certain privileges and are under certain disabilites. An infant cannot be prejudiced by lapse of time, because he is under disabilities. The object of placing infants under such disabilities is to protect them against doing acts the full force of which they cannot understand because of their inexperience. **So an infant cannot make a contract, except for his necessaries,** that is for food, clothing, schooling and such other things as are reasonably necessary for his support, taking into consideration his station in life and resources; for example, an infant having property amounting to one hundred thousand dollars is given greater latitude in purchases than one whose resources amount to only a few hundred dollars. An infant cannot make an admission to affect his rights. Infants are always objects of peculiar regard by the courts which will always interfere for their protection, either in regard to their custody or guarding their interests in case of suits against them, or by them. The law generally makes provision for delinquent and vagrant children by providing industrial schools for them, or awarding their custody when the parents are unsuitable to a proper society or person.

Infants have the right to take and hold property, but cannot be deprived of it except as provided by law. An infant can give a receipt for a legacy, but is not precluded when he

arrives at maturity from showing that a smaller amount was paid to him than he was lawfully entitled to. An infant may buy property, but he can repudiate his purchase when he arrives at full age; in such case he must return the consideration that he has received. The acts of an infant are as a rule only voidable, that is they are subject to be set aside when the infant arrives at full age. An infant can enter into a contract of marriage.

An infant, however, may be an agent for an adult or may act in certain cases as trustee. He may become a partner, or engage in business, but all his contracts are subject to be repudiated when he becomes of age, subject of course to the rule that if he wishes to disaffirm a contract he must give back what he has received under it.

Most of the litigation over the contracts of infants is in regard to what constitute necessaries. This term not only includes such things as are required for sustaining life, but also those which are suitable and necessary for his proper use, support and comfort, considering his condition in life and resources. Necessaries include medical attention in case of sickness. Where an infant has an allowance from the court, or his guardian, of a sum sufficient to supply himself with suitable necessaries, he is not liable for necessaries supplied on credit. Usually the parent or guardian is liable for the support of his child, or ward, and consequently an infant living with his parents, or guardian, who supplies him with a home, clothing and support, cannot bind himself to a stranger or buy things on credit. If, however, an infant is married, his capacity to contract for necessaries becomes greater for he will be bound for all reasonable necessaries not only for himself but for his wife and children as well.

An infant is liable for crimes committed by him, or wrongs done by him. An act done by an individual which results in an injury to another, is called a "tort," and an infant is liable for all torts done by him, as for example, assault, false representation, fraud or under certain circumstances for acts of negligence. An infant, however, will not be liable for either

torts or crimes if he is of such tender years as to not be able to understand the nature or consequence of his act, as for example, if a boy five years old should in playing with a gun accidentally kill someone, or should act so carelessly as to cause injury to person or property. It is a question for the court and jury to determine whether the infant is of such tender years or not.

An infant can sue or be sued; in the former case he brings his suit either by his **general guardian** appointed by the court, or by what is called his **"next friend,"** that is a person appointed by the court to bring a particular suit in his behalf. When an infant is sued, if he has no guardian whose duty it is to defend the suit, the court will appoint a temporary guardian to protect his interests and such a person is called a **"guardian ad litem."** The usual practice is for some near relative to be appointed next friend, or some near friend, or attorney, to be appointed guardian ad litem, but the court will always itself see that the interests of an infant are properly guarded.

The father, or in case of his death, the mother, is what is termed the "natural guardian" of an infant entitled to his custody and charged with the duty of properly caring for him and guarding his interests, but if the infant has property in his own right it is usual for the court to appoint a guardian of the estate, or what is in some states called a "curator," or guardian of both person and estate in case the infant is an orphan. If the property is derived from the parent, such parent can be appointed guardian of the estate without bond, but usually a guardian, or curator, or as it is called in Louisiana the "tutor," is required to give bond.

A father may under the laws of most states appoint a guardian for his infant children by will, but he cannot in that way deprive the mother of her right to the custody of her children and if such infant has property the guardian must give security to the proper court.

The appointment, duties and liabilities of guardians, curators or tutors, is in practically every state prescribed by statute, and these statutes provide how and by whom, and under what

circumstances, a guardian may be appointed, what are his duties, how he shall make reports or settlements and account for the property entrusted to his care. An infant above the age of fourteen can generally select his own guardian, or if one has been appointed for him before he has reached that age he may upon attaining such age select a new guardian.

The duties of a guardian of the estate are in a general way to return to the court appointing him an inventory of the property of the ward, make periodical statements, or settlements, of his accounts and obtain the authority of the court for any unusual payments. Usually the court upon application makes an allowance for the support of the infant. When the infant attains majority the guardian must make an exhibit and settlement of his accounts and file in court the receipt of his ward for the property in his charge. In some states the ward must appear personally in court to acknowledge satisfaction.

A guardian must have no interests in conflict with those of the minor, is bound to exercise the utmost good faith and fair dealing, and should strictly follow the requirements of the law as to the investment and protection of the ward's estate. A guardian is entitled to a reasonable compensation for his services, or to the compensation fixed by law.

If the ward has property in several states there may be a home guardianship at the domicile, or home, or residence of the minor, and a branch, or what is called "ancillary", guardianship, in other states where the ward has property. Usually the statutes make provisions for the transfer of an infant's property from one state to another. These statutes also provide how the real estate or personal property of the minor shall be managed or sold and for the application of the proceeds of such sale.

CHAPTER XXII.

INNKEEPERS.

THE proprietor, or manager of a hotel, or place for the entertainment of travelers not disorderly or unfit, who are to pay an adequate price for their entertainment is in law called an "Innkeeper." An inn, or hotel, is a house where a traveler, or transient, is furnished with food and lodging as a matter of business and generally is a place of entertainment for travelers, or transient guests. An innkeeper holds himself out to the world as prepared to entertain all proper persons who apply for food and lodging. A restaurant, or coffee-house, which only undertakes to supply food or drink, or a house which only offers to furnish lodging, like a lodging house, or an apartment hotel, or a sleeping car, is not an inn. An innkeeper and one who operates a boarding house are different in that the former holds himself out as willing to serve the public while the latter is at liberty to choose his guests and make such arrangements with them as they may agree upon.

The state, or city, has a right to regulate inns and houses of public entertainment, as well as places where liquor is sold to be consumed on the premises, because the public is interested in having them properly conducted. All such houses may be regulated either by statutes passed by the legislature or by the municipal assemblies of cities under ordinances. Moreover, the municipal authorities have power to provide that the business of innkeeping shall not be conducted except under a license and a penalty can be imposed upon one who operates such a house without a license.

An innkeeper is obliged to receive all travelers who apply for entertainment, provided he has room to accommodate them and they pay reasonable charges. He has the right to require the **payment in advance** of the price of entertainment. The innkeeper must provide **suitable accommodations for guests** and keep on hand food for their consumption. **Objectionable persons can be excluded** and if a guest who has been admitted afterwards becomes obnoxious by his own fault or is guilty

of improper conduct he may be excluded. The relation of host and guest is established by the traveler applying for accommodations and having his application accepted. Generally a person who regularly and continuously lives in the hotel is not a guest, although if he is received as such the hotel keeper may be liable to him as a host, but otherwise he is only a boarder. **A hotel keeper may be liable for the baggage** of a person if he accepts it for custody, but in such case is only bound to exercise such care as an ordinarily prudent person would exercise under similar circumstances in the care of his own property.

It is the duty of a hotelkeeper to take reasonable care of his guests and protect them from injury or insult, but he is only bound to exercise reasonable care and a guest is only entitled to reasonable accommodations. **The hotelkeeper must protect his guest** against injury from third persons, or from servants, if such injury could have been prevented by ordinary care, and a hotelkeeper is liable for injuries to his guests caused by defective premises or by bad food. **He is also liable for all goods of the guest lost in the inn** unless such loss is inevitable, such as is caused by act of God, such as an earthquake, tornado or unusual storm, or public enemy, or by fault of the owner. A host is liable for the property of his guest which is burned by accidental fire or stolen without the fault of the owner, or stolen by the servants, and even if the goods are destroyed or injured by an unusual storm he is liable if he has not taken proper precautions to guard against such disaster. Generally, however, **statutes exist in most of the states limiting the liability of hotelkeepers** and if the host has provided a place of storage, as a safe, for the care of jewelry, money or valuables of the guest, he is not liable if such guest refuses to avail himself of the facilities so provided. A guest may be temporarily absent from the inn and yet the innkeeper is liable for the loss of his property, provided the guest had an intention to return within a definite or reasonable time, and the innkeeper is entitled to compensation during such absence.

An innkeeper is only entitled to a reasonable compensation

for the entertainment of a guest and such compensation can be fixed by the innkeeper or may be determined by special agreement. Generally the innkeeper has a lien on the goods of his guest for the amount of his charges, but generally such lien is regulated by statute.

One who is not a guest of a hotel has usually no legal right to enter it or remain in it against the will of the proprietor, but a stranger who has business with a guest, if the guest so requests, should be admitted, but strangers or visitors for social purposes may be excluded. Generally statutes provide that acts of fraud on the part of the guest, as an attempt to remove baggage without paying charges, or "beating" a bill, is an offense punishable by fine or imprisonment.

CHAPTER XXIII.

INSANE PERSONS.

A PERSON whose mind is either partially impaired, or wholly destroyed, is variously called "insane," of "unsound mind," or "non compos mentis." He may be an idiot, or lunatic or only subject to delusions **Insanity in law means a condition where an individual is deprived of his reasoning ability or of using his mind with an understanding of what he is doing. In law all men are presumed to be sane** and if the contrary is claimed it must be shown, but if insanity is once proved it is presumed to continue.

The law makes provision for the preservation and protection of the property of an insane person and for the care and custody of his person. If he is incapable of properly protecting himself, or is so mentally deranged as to be violent or dangerous he may be confined in an asylum. Generally the law makes provision by statute for the protection and care of the property of an insane person by providing that when he is found to be of unsound mind in a proceeding properly instituted in a court having jurisdiction, a guardian may be appointed for him and such guardianship may be either of the person or estate or both. The **duties of such a guardian are defined by law** and he is required to give bond and to exhibit statements of his accounts at periodical intervals and must obtain authority of the court for unusual proceedings or investments. **The statutes regulate the proceedings necessary to have a person declared of unsound mind and such insanity must usually be declared by finding of a jury.** Statutes regulate the powers and duties of a guardian and fix the amount of the compensation for his his sevices. He is bound to account for all property of his ward and if such ward recovers his reason he must make a settlement with him and restore what of his property is left.

A husband is liable for the support of an insane wife, or the wife of an insane husband if she has property, and the parent is liable for the support of an insane child. If the insane person is destitute of means he is usually taken care of at public expense in an asylum provided for that purpose.

An insane person may receive and hold property, and if he have lucid intervals, make conveyance or sale of the same, but all contracts made by a person of unsound mind are subject to close scrutiny and the law will not permit him to be imposed upon. The estate of an insane person is liable for his support. **An insane person, or a person of unsound mind, may contract for necessaries** the same as an infant, that is for clothing, food, or lodging. **A contract entered into by a person who at the time is of such unsound mind as to be incapable of understanding what he is doing is sometimes void and always voidable,** that is it can be set aside upon proper application made for the purpose but the consideration received must be returned. After a person has been declared insane and a guardian appointed he is incapable of making any contract and any person who deals with him does so at his peril, but one may in good faith deal with an insane person who has not been placed under guardianship and if he makes a contract with him which is fair and reasonable, such contract will be valid and will be upheld.

An insane person is liable civilly for any wrong that he may commit, or for injuries to another caused by his negligence, but as an insane person is incapable of criminal intent the damages to be recovered will only be allowed to the extent of adequate compensation.

An insane person is not criminally liable if his mind is so diseased as to make him incapable of understanding the difference between right and wrong, or incapable of understanding the nature and effect of the act, and sometimes if a man commits a crime before he becomes insane he cannot be punished unless he recovers his sanity.

Insane persons may be sued or bring suits in the same manner as an infant, that is by next friend, or guardian, and if a suit is brought against an insane person the court will appoint a temporary guardian to defend the interests of the insane person if he have no regularly appointed guardian.

CHAPTER XXIV.

INSURANCE.

A **CONTRACT of insurance is one by which a corporation, or individual, or association of individuals, called the "insurer," in consideration of a certain payment, called the "premium," agrees to pay to a party, called the "insured," a certain sum of money upon the loss, or destruction, or injury, of his property or person or in case of his death.** The writing containing this contract is called a **"policy."** Usually a written **application** is made for the policy and, if referred to therein, forms a part of the contract.

Insurance in this country is carried on by corporations organized for the purpose and, as the business is one in which the public has an interest, statutes of most, if not all, of the states provide that such business shall be only carried on by corporations which have obtained a **license from the state** issued by an authority called its **"Insurance Department."** This Insurance Department exercises a superintending control over the companies by frequent examination of their financial condition so as to insure their solvency, and the business is largely regulated by statutes which forbid certain conditions to be inserted in the policy and prescribe the rights and liabilities of the parties.

Insurance is based upon the law of averages and is for the purpose of apportioning among a class of people, who are subject to casualty, the losses of the individuals composing the class. For example, experience has demonstrated that if a thousand houses, or a thousand manufacturing establishments, are insured against loss by fire the losses during any one year on an average will only amount to a certain percentage; so the amount of the premium to be paid by persons insuring their property to secure this indemnity can be determined by collecting enough money from the insured to meet the expected losses adding an allowance for expenses and possible increase in the percentage of loss. If a thousand people insure their lives, only a certain number will on an average die during any one year, so the amount of premium necessary to be paid by

all persons to meet the losses can be accurately estimated. Records of the number of deaths that will occur out of a certain number of people each year according to age have been kept, and from them have been prepared what are called **"mortality tables,"** showing, out of, say ten thousand children, born in any one year, the average number that will die each year until the last survivor passes away at perhaps the age of one hundred. The business of life insurance is based upon the probability of death according to the average percentage shown by these tables: that is the premium is according to the risk.

Originally the only kind of insurance carried on was against the perils of the sea, called **"marine insurance."** Later companies were organized to insure property against **loss by fire.** Afterwards against **loss of life,** and during the last fifty years companies have been formed to insure against **injury or loss of life by accident;** against **loss of time through sickness;** against **defalcation, or theft,** or **burglary; or loss from the elements,** such as tornado, or hailstorms. Almost any kind of loss or peril can be insured against.

The contract of insurance is intended to be one of indemnity and all forms of insurance, except that of life, are purely agreements to indemnify the insured upon the happening of a loss to its actual extent. As human life is priceless there is no limit to which a man can insure his life. **An insurance contract is one of chance,** that is involving uncertain hazards. **No one can insure property in which he has no interest, nor can he insure the life of another unless he has a reasonable expectation of loss because of the death of such insured, or advantage from the continuance of the life.** From this public policy, which forbids gambling contracts, arises what is called **the law of "insurable interest,"** that is no person can take out a policy of insurance of any kind unless he has an insurable interest in the property or life to be insured.

The subject of insurance, whether property or life, or anything else, is called the "risk." Policies of insurance are **personal contracts,** especially those insuring against loss or damage by fire; **therefore a fire insurance policy cannot be**

assigned without the consent of the insurer. In some states policies of life insurance are looked upon the same as other property and can be assigned in the same way, but in others the law forbids the assignment of a life insurance policy to one who has no insurable interest to the same extent as it forbids the issuance of such a policy in the first instance to one without any insurable interest.

A contract of insurance is one requiring the exercise of the utmost good faith on the part of the insured and he is bound to make a full and fair disclosure of all circumstances affecting the risk when he applies for a policy.

In many states statutes exist forbidding discrimination on the part of insurance companies in the way of giving any one person an advantage over others by the way of a decreased premium or rebate or special privileges. These statutes also forbid combinations on the part of insurance companies by the way of agreeing not to charge less than a certain premium. In some states the law requires a copy of the application for a life insurance policy to be attached to such policy.

Policies, in case of ambiguity in the language used, are construed most favorably in favor of the insured and against the insurer, and the written portions of the policy prevail over the printed portions. Insurance policies of all kinds generally contain, in addition to the requirement of proofs of loss, the condition that in case of loss suit must be brought within a limited time or the company will not be liable. In some states such a requirement is void but in others it is held valid and in the latter if loss occurs suit must be brought within the period specified in the contract.

Fire Insurance.

A policy of fire insurance is one of indemnity only and contains two classes of agreements; those covering things to be done on the part of the insured and those to be performed by the company. These agreements may relate to things to be done before loss or afterwards. Every person who takes out a policy of fire insurance should read it carefully.

The usual stipulations in policies on the part of the company cover the agreement to pay a stated sum in case of loss, if proper proofs be presented and the conditions of the policy to be performed by the insured are complied with. **The company agrees to only be liable for the actual cash value of the property at the time loss occurs** and that actual cash value is to be determined with the proper deduction for deterioration.

The conditions to be complied with by the insured provide that the policy shall be void **in case the insured has concealed or misrepresented any material fact** relating to the risk; or if the insured shall **take out other insurance** on the same property without the consent of the company; or if the subject of insurance be a **manufacturing establishment and it be operated at night,** or **cease to be operated for a specified time;** or if certain alterations and repairs be made without the consent of the company; or if the **interest of the insured be other than unconditional and sole ownership; or** if it be a **building on ground not owned by the insured;** or if **the personal property insured be incumbered by a chattel mortgage;** or **foreclosure proceedings** be commenced; or if **change other than by the death of the insured takes place in the interest, title** or **possession of the subject of insurance;** or **if the policy be assigned before loss;** or if **dangerous explosives be kept on the premises;** or if the **building fall,** except as the result of a fire. The company is not liable for loss occurring by **invasion, insurrection, riot** or **civil war,** or if the insured neglect to use **reasonable means to save and preserve the property** at or after a fire, nor is the company liable for loss to **money, papers, notes or securities, curiosities, jewels, pictures,** or similar articles unless they be distinctly specified in the contract. **The property insured cannot be removed to another locality without the consent of the company.**

After loss the insured is required to give immediate notice of the loss to the company, which means notice within a reasonable time under all the circumstances, and **furnish proofs of loss** on forms furnished by the company, giving a list of the property destroyed with its value, and such other information

as is required, and **in case of disagreement as to the amount of the loss there is a condition that it shall be fixed by appraisers.** Such conditions are valid and breach of a condition will prevent recovery in case of loss.

If the insured be a **merchant,** he is required to make and **keep an inventory** of the goods covered by the policy, such as a stock of merchandise; **keep his books of account at night in an iron safe;** and in case he has **other insurance** the company is only liable for **its proportion of the loss.** Policies contain the condition that there shall be no **waiver on the part of the company** of the conditions of the policy unless such waiver be endorsed on the policy by an authorized officer, but in spite of this provision the courts hold that by its conduct the **insurer may waive such condition, or by its conduct misleading the insured be what is called "estopped,"** that is forbidden to claim the benefit of such provision.

Life Insurance.

A life insurance policy is usually the result of a written application therefor, which must be accepted by the company by the issuance of a policy and such policy usually refers to the application and makes it a part of the contract.

The statements in an application are called "warranties" or "representations," the latter need only be substantially true, while all statements, made warranties by the terms of the policy, must be literally and exactly true. The statutes of many states provide that all statements in the application shall be deemed representations and shall not vitiate the policy unless they contribute to the loss. Life insurance policies are either **whole life,** that is payable at death, or **"term,"** that is extend over only a certain number of years, or **"endowment"** where the amount is payable at the expiration of a certain time, usually ten, fifteen or twenty years, if the insured be then living, or if he die before that time, and the premiums may be either paid annually, semi-annually or quarterly, or the entire premium may be paid in one sum, or for a specified number of years.

The theory of regular life insurance is the payment of an annuity by the insured commensurate with the risk, which if continued until the insured reaches the age of ninety-six or one hundred will, with compound interest, amount to enough to pay the policy and the expenses meantime of operating the business. It will thus be seen that this method of doing business is the reverse of the undertaking for an "annuity" where a company, in consideration of the payment of a gross sum, agrees to pay a specified annual amount to a person during his life. Excess of premiums in mutual companies is returned to the insured in the shape of **dividends** either annually or at the end of a certain period. **"Tontine" dividends** mean that the dividends due a class are put in a fund to accumulate and be paid to the survivors at the end of a certain period.

Life policies sometimes contain a provision against an **increase of the hazard** by engaging in a hazardous occupation and that they shall be void if the insured shall **die because of violation of law** or **commit suicide.** In some states the law provides that suicide shall be no defense unless the insured contemplated suicide at the time the policy was taken out.

Policies of later days also contain what is called the **incontestable clause,** which is that after a certain period of time, usually one or two years, the policy shall be incontestable except for non-payment of premium. **This does not forbid, however, a company setting up the defense of want of insurable interest or the defense that the conditions of the policy as to proofs of death have not been complied with.** On the death of the insured the policy requires that **proofs of death** be made on blank forms furnished by the company, usually consisting of the sworn statements of the claimant and the undertaker and attending physician and sometimes as to the identity of the deceased. These conditions as to proofs of death must be complied with before the right of bringing suit arises, if no proofs are furnished, or offer to furnish them made, the insurer will not be liable. If, however, the company refuses to furnish blank forms upon which to make proofs, or disclaims any liability, it will be deemed to have **waived the condition as to proofs.**

A person if he pays the premium himself can insure his life for any amount and make the policy payable to whomsoever he chooses, but no person can insure the life of another unless he has an insurable interest in such life. A parent has an insurable interest in the life of his child, or a husband or wife in the life of the other, a creditor in the life of his debtor, or one partner in the life of the other. In most states the creditor who holds a policy of insurance on the life of his debtor can only claim the amount of his debt with interest, together with any premiums that he has paid with interest, and the balance must be turned over to the estate of the deceased. **Insurable interest is not created by mere relationship** but there must be a dependence or reasonable probability of advantage from the continuance of the life of the insured or pecuniary loss in case of death.

Payment of premium must be made within the time specified by the policy and non-payment of premium will cause forfeiture, except when there is a provision, either in the policy or in the statutes, that after a certain number of premiums have been paid, the policy shall in case of lapse, be extended for such time as the reserve on the policy will pay for, which is called **"extended insurance;"** or the reserve be applied to the purchase of what is called **"paid up insurance."** In the former case the policy is extended for its full amount for a limited period, in the latter for the term of life although for a smaller amount. **What is called the reserve on the policy is a certain amount reserved or laid aside from the premiums** to accumulate at compound interest and applied to the payment of the policy at its maturity, or in case of reinsurance to pay the consideration required by the reinsuring company. This provision requiring a reserve, generally fixed by statute, is to insure the solvency of the company because its contracts extend over a long period of time. **Neither insanity nor sickness is an excuse for the non-payment of premiums.** If notice of premium be required by the terms of the policy, such notice must be given and in at least one state, notably New York, life insurance companies are required to give at least thirty days notice of

the time fixed for the payment of premium, but this requirement only extends to policies issued in that state.

In the law of insurance **if the insured has concealed any material fact** which good faith required him to disclose, and such fact be material to the risk, such **"concealment,"** as it is termed, will vitiate the policy.

The **business of life insurance** is generally carried on by what are called **"old line" life insurance companies,** which may be either **mutual companies,** that is composed of all the policyholders, or **stock companies,** where the corporation has a capital stock the same as in other cases. A company may be both stock and mutual, that is the profits after a certain dividend is paid to the stockholders go to the policy holders. Within the last forty years associations have been formed which are now known as **"Fraternal Beneficiary Associations,"** having lodges, a ritual for the reception of new members, and a representative form of government, that is the representatives from the lodges elected by the members form a superior body which enacts laws for the government of the association or order. These fraternal, or co-operative, associations pay a death benefit and the business is practically that of life insurance. These associations have increased to a marvelous extent. The policy issued by a fraternal beneficiary association is called a **"benefit certificate,"** which generally refers to the laws of the Order and the application for membership, all of which with the charter of the society constitute the contract.

These benefit certificates differ from life insurance policies in that in the latter the policy contains the entire contract, which is between the beneficiary and the corporation, and the insured has no right to change his beneficiary unless the power to do so is expressly reserved. Whereas, in the former the beneficiary society and the member are the parties to the contract and **the member has no property in the benefit to be paid but only the power to appoint a beneficiary,** and, as the designation of beneficiary is analogous to making a will, he **can change the beneficiary** as often as he wishes by compliance with the formalities prescribed by the by-laws for such change.

As these societies are favored by the state they are usually exempted from the insurance laws applicable to regular companies. **The classes of beneficiaries** to whom certificates may be made payable are usually confined to members of the family, blood relatives, or persons dependent upon the members, or an affianced husband or affianced wife, and **payments of benefits cannot be made to persons not included in such classes.**

The **premiums** on a life insurance policy are usually paid quarterly, semi-annually or annually, or for a specified number of years, whereas the fraternal beneficiary societies collect the premiums, which are called **"assessments,"** usually every month; while in a regular life insurance policy non-payment of premium does not always work a forfeiture but, because of the reserve, the insured is entitled to extended or paid-up insurance, non-payment of an assessment in a fraternal society generally works an absolute forfeiture, subject to the right to be reinstated by compliance with the laws of the society regulating such reinstatement.

Accident Insurance.

A policy of accident insurance undertakes to pay a specified amount in case of injury, or loss of life, by accident. In effect it is practically a form of life insurance but only in case of death from accident. An accident is something which happens unexpectedly. It differs from mistake in that the latter supposes the operation of the will of the agent in producing the event, while an accident is an event which happens without any direct intention of the person by whose agency it was caused. **Accident insurance policies limit the insurance to injuries received by "external, violent or accidental means,"** with the further provision that the insurance shall not extend to any bodily injury of which there shall be no **"external and visible signs"** upon the body of the insured. The further provision is usually made that **the accident must be the "sole and proximate cause" of the injury.**

By external, violent and accidental means is meant that in the first place the injury must be the **result of accident** and also

that there must be involved **the element of violence** and that such violence must come from an **external cause.** It is not always easy to determine exactly what is included in these terms, but in the following instances the company was held liable; where the insured was lifting a heavy burden in the usual course of business and his spine was injured; where the insured was driving and his horse ran away and he died from fright or strain; where a rupture resulted from exercise with indian clubs; where tight shoes caused a chafing of the toe which resulted in blood poisoning and death; where a man was wounded by his cutting a corn also resulting in blood poisoning and death. Spots of blood upon the face and red spots on the skin have been held to be external and visible signs.

The accident must always be what is called the proximate and sole cause of the disability or death, as where the insured was accidentally shot through the foot which caused lockjaw and while suffering from it he cut his throat; and where a man fording a river was taken with a fit, fell into the water and was drowned.

A condition usually found in accident policies is that **the insured must not engage in a more hazardous occupation.** A mere temporary occupation by the way of diversion, or recreation, is not held to be engaging in such occupation; so where a farmer is drowned while attempting to save persons from a wreck, or a merchant was killed while spending a day hunting; it was held that the former was not engaged in the occupation of wrecking, nor the latter engaged in the occupation of a hunter.

The company is not liable in cases where the death or injury has happened in consequence of "voluntary exposure to unnecessary danger," or where the risk was obvious, and the insured is required to use all "due diligence for personal safety." A voluntary exposure to unnecessary danger must be wanton, or a piece of gross carelessness, as where a man acts so recklessly and carelessly that he shows an utter disregard of a known danger. **There can be no voluntary exposure to unnecessary danger if the insured was ignorant of the danger,** as where a

passenger on a railroad train, which had stopped on a bridge at night, stepped from the car and fell through a hole in the bridge and was drowned; and where a traveler on a train arose in his sleep and walked to the rear platform and fell off and was killed, but it is exposure to unnecessary danger where a man walks on a railroad track on a dark and rainy night at a time when he knew trains are frequently passing.

The company will generally not be liable if the death be caused by taking poison, either accidental or otherwise, as where the insured by mistake took a poison instead of his usual medicine.

The company will not be liable where the injury is caused to a traveler **by his violating the rules of the company;** or in case of **injuries received while fighting; or while intoxicated;** or where **the insured was violating some law;** or where **the injuries were intentionally inflicted by another person.** Where the injury was inflicted by an insane person, it was held that the exception did not apply because an insane man cannot form an intent.

Accident policies also cover disability, as for example, that a specified amount is to be paid in case of a total disability and inability to follow his own or some other occupation. **Such a condition, as all others, must have a reasonable interpretation** and the courts will be liberal in construing what is meant by **"total disability,"** which of course depends upon the occupation of the person injured and the extent and nature of the injuries, and will also be liberal in construing what is meant by the provisions in regard to loss of eyes or limbs.

Accident policies also provide that **immediate notice of loss shall be given and the proofs required by the comapny shall be furnished. The word "immediate" means a reasonable time under all the circumstances of the case** and may be either one day or one month. What is a reasonable time depends upon all the facts and circumstances of each particular case. **Insanity may excuse the giving of notice.**

Accident policies always provide that **they shall not be payable in case of injuries intentionally inflicted** by the insured or any other person or **in case of suicide, sane or insane.** In some

states it is provided by statute that suicide shall not bar recovery unless the insured had the intent to commit suicide at the time the policy was taken out, and recovery has been allowed on an accident policy in case of suicide because of the peculiar wording of the statute. A person may be so far insane as to not understand the nature or consequence of his act and be incapable of forming an intent to take his own life, in such cases **suicide is an accident.**

Miscellaneous forms of Insurance.

Other forms of insurance are quite common at the present time, such as **"Casualty,"** or insurance against injuries caused to another by negligence or accident; **"Credit,"** as where credits are insured; **"Fidelity,"** as where the fidelity of employees is insured; **"Plate Glass,"** where plate glass is insured against breakage or loss by fire; **"Theft"** or **"Burglary,"** as where property is insured against loss by theft or burglary; **"Title,"** where the title to real estate is insured; and insurance against **loss from storms, cyclones, hail;** or where **live stock** is insured against death. The contracts covering these forms of insurance contain many conditions which if reasonable will be upheld by the courts and in case of loss all acts which are to be performed by the insured, such as for instance furnishing proofs of loss must be complied with.

CHAPTER XXV.

INTEREST AND USURY.

INTEREST is a percentage or compensation allowed by law, or fixed by the parties, for the use of money, or allowed by law for the wrongful withholding of money after the time at which it should have been paid. Interest is either "**simple,**" that is calculated on the principal for a specified time, or "**compound,**" which is interest on interest, that is at periodic intervals the interest is added to the principal and interest again calculated on such increased sum. "**Legal interest**" is the rate prescribed by law if no agreement is made for any other rate, in which case it will be presumed that the parties intended that legal interest should be paid. This is the rate to be paid on judgments and overdue accounts. The term "**lawful interest**" means such rate of interest as the parties to a contract may agree upon; thus, where no rate is specified, the legal rate of interest in many states is five, six or seven per cent, as the case may be; while the parties are allowed by special arrangement to agree upon a greater rate of say, perhaps ten or twelve per cent. The law allows interest by way of a compensation for the detaining of money after it becomes due, or permits persons loaning or hiring money to collect compensation for its use. Sometimes interest is allowed as damages.

Interest on a note runs from the time when it becomes due or payable, or from its date as may be agreed, or in case of a debt from the time at which it became due and should be paid. Parties by agreement can fix not only the rate of interest within the limit fixed by law, but also the time when interest is to begin. Where money is to be paid on a day certain, or a debt is payable at a specified time, if payment is not made then the law implies a contract on the part of the debtor to pay the legal rate of interest until such debt is paid.

The taking of more than the lawful rate of interest is called "usury." From the earliest times those who had money to loan always endeavored to obtain the highest possible rate of interest for its use. In many cases lenders took advantage of

the necessities of the borrower to extort an excessive and unreasonable rate of interest. **The term "usurer" has always been one of reproach** and in nearly all states statutes have been enacted fixing the legal rate of interest and the rate which may be charged by a lender by special agreement, and penalties are imposed for exacting more than the lawful rate of interest.

The Court will always look into all the circumstances of the case to determine whether usury has been exacted and will closely scrutinize the transaction to see if certain payments made by the borrower, under the guise of commissions and expenses, constitute in realty the exaction of usury. The courts will disregard the form of a transaction and will always look to its substance to determine whether or not the transaction is tainted with usury.

In some states **the exaction of usury is punished by a forfeiture of all interest,** in others the debt is made void, in others the exacting of usury is **an offense** punishable by fine or imprisonment.

The right of a borrower to set up usury as a defense in an action to recover the debt is personal, that is it can only be claimed by the debtor unless the transaction is made void by statute in which case such defense can be set up by his personal representatives or persons affected by or interested in such transaction.

CHAPTER XXVI.

LANDLORD AND TENANT.

THE relation of landlord and tenant is that which exists between two parties for the occupation, or possession, of lands, or tenements, by one in consideration of a certain rent to be paid therefor to the other. Tenements mean usually houses, rooms, buildings or something that can be held or used. The party owning or controlling such lands or tenements is called the **"landlord."** The party to whom the occupation is given is called the **"tenant."** The contract which specifies the terms upon which such lands or tenements are to be occupied is called a **"lease."** The landlord in the the lease is often called the **"lessor,,** and the tenant the **"lessee." To create the relation of landlord and tenant there must either be an express, or implied, valid contract** and such validity is determined by the same principles which govern other contracts. **The consideration of the lease is called "rent,"** although a valid lease may be made without any reservation of rent. A lease may be made of any property, such as houses or lands, but a lease of personal property is called a **"bailment."** An agent placed in possession of the premises by the owner for its management is not a tenant, nor is a lodger, nor one who rents a room or several rooms in a house. In the latter case the party in possession of the house retains the possession and custody of the same but only permits the temporary occupation of part of the premises by a lodger.

A tenancy may be either express, as where a lease is made, **or implied,** as when a person occupies premises with the permission of the owner in which case there is an implied contract on the part of the tenant to pay rent, and if no rent is agreed upon a reasonable rent.

A lease may be made verbally but, under the statutes of most if not all the states, a lease for a longer period than one year must be in writing. No particular words are necessary in order to create a lease, but it must appear that the intention of one party was to permit the other to enter and occupy the premises pursuant to the agreement and on the other to occupy

the premises and pay rent. **No particular form is essential to the validity of a lease.** It is enough if the writing describe the premises and specify the period of duration of the lease, or for what length of time the lease is made, and the amount of the rent to be paid and how and when it is to be paid. If an agent executes a lease his authority generally must be in writing. If formalities are prescribed by statute for the execution of leases they must be substantially followed, and if an acknowledgment before a notary public or other similar officer is required, it is necessary that the lease be so acknowledged. A lease is construed the same as all other contracts, that is the intent of the parties must be looked for and words construed in their ordinary meaning.

Generally a lease is made by the owner of the property, but the relation of landlord and tenant does not depend upon the title of the landlord because if a tenant accepts a lease he cannot deny the title of his landlord. The purchaser of land takes it subject to a lease because every purchaser of land is bound to examine the property, and if it is occupied by some one learn what the claims or rights of such occupant are before he purchases the land. **The original lessor remains liable** on all his agreements contained in the lease even though he may have sold the premises or assigned his interest in the lease, and **the original lessee remains liable** on his covenants to pay the rent although he may have sublet the premises to another party. **It is the duty of the tenant to use the property so as not to injure it unnecessarily,** but he is not liable for ordinary wear or tear nor is he liable for injury to, or destruction of, the premises by fire not caused by his own negligence. A tenant is liable for the acts of his servants and business associates.

Although the tenant cannot deny his landlord's title he may show that he has acquired such title by purchase. He cannot acquire a title as against his landlord by a purchase at a tax sale, where it was his duty to pay the taxes, nor can he purchase a mortgage on the premises and claim under it before he has surrendered the possession. Neither can a tenant make

an admission of the title of a stranger, which is called an "attornment."

Leases may be made for any length of time, but a valid lease cannot be made for a longer period than one year unless it is in writing. Both parties are bound by the agreements contained in the lease as to the use to which the premises are to be put and a tenant cannot sublet without the consent of his landlord if the lease so provides. **The landlord is not bound to repair the leased premises** and the tenant may be liable for rent although the premises have been destroyed by fire, but usually there is a provision in the lease that the destruction of the premises by fire shall terminate it. Where the lease is for no specified time it is called a **"tenancy from year to year," "or month to month,"** according as the rent is to be paid. If a monthly rent is reserved the tenancy is from month to month, if a yearly rent is reserved it is from year to year, and a lease for no definite term with an annual rent is a lease from year to year. If the tenant, after the expiration of a lease for a given period, holds over, or retains possession, he is regarded as a tenant from year to year, or month to month according as the rent was payable under the lease, or at the election of the lessor he may be evicted.

A tenancy from month to month is practically a lease at will, that is it may be terminated by a notice from either party of an intention to quit or end the tenantcy. If a tenant is occupying premises from month to month if he intends to move **he must give a month's notice** to his landlord, and on the other hand if the landlord wishes to terminate the lease he must **give a month's notice** to the tenant.

Where real estate is occupied without any reservation of rent, or agreement for its payment, or without any time specified for the occupation, it is **a tenancy at "will" or at "sufferance,"** and may be terminated by the landlord at will although reasonable or legal notice of an intention to terminate it must be given.

The lease of a building is a lease of the land upon which it stands. The lease of a part of a building passes with it as

incident thereto whatever is necessary to be used with or required for the reasonable enjoyment of such portion. Under a lease of a building everything passes which belongs to it or is used with it. There is no rule which requires the premises to be in a tenantable condition, but there is an implied obligation on the part of the lessor that the premises shall be ready for occupancy at the commencement of the term, and if the landlord conceals defects in the premises which the tenant could not have discovered by reasonable diligence, it is such fraud as avoid the lease and the tenant can remove from the premises and recover any rent that has been paid in advance and damages for the loss occasioned by such removal. **Unless it is so expressly agreed there is no implied covenant on the part of the lessor that the leased premises are suitable or fit for the particular use for which they were intended by the lessee.** It is a general rule that the use of the word "lease," in an instrument of lease implies an agreement on the part of the landlord that **he will do nothing to disturb the quiet enjoyment of the premises** by the tenant and if the landlord by his conduct makes such quiet enjoyment of the premises by the tenant impossible, such tenant may remove from the premises and is excused from the performance of the covenants of the lease. This is called an **"eviction."** If the landlord creates a nuisance by which the tenant cannot enjoy the reasonable use of the leased premises, he may give up such possession and abandon the premises.

The crop raised on the leased premises, as in case of a farm, belongs to the tenant, but a tenant may lose the right to the crops by a forfeiture of the lease or surrender of the possession. The right of a tenant to crops depend practically upon the conditions of the lease and no inflexible rule in regard thereto can be laid down.

A tenant may become liable to third persons for injuries received because of a failure to keep the premises in a reasonably safe condition, but where the injuries to such third person are due to the faulty or defective construction of the premises, or because of a continuing nuisance therein, or where the landlord

retains control over the premises or part where the injury occurred, such as a passageway or elevator the landlord is liable for such injury. **A tenant is obliged to pay rent at the rate agreed upon in the lease, or, if he is a tenant at will, or by sufferance, he is obliged to pay a reasonable rent.** The tenant may be liable for rent, although he does not actually occupy the premises, as when he has the right to occupy them, or has sublet the premises to another who has moved out.

Where there is no fraud or misrepresentation, **the landlord does not warrant that the premises are fit for occupation,** unless he has expressly agreed that they are, and if the premises become untenantable the tenant is not released from his duty to pay rent, unless it is so stipulated in the lease, nor can he abandon the premises and avoid payment of rent on the ground that the plumbing is defective so that the house is full of sewer gas unless some agreement in the lease provides for such a termination of the tenancy, or unless the landlord has concealed from the tenant the true condition of the premises which the tenant was not able to discover by a reasonable inspection. The same rule applies where the occupation of the house becomes dangerous from an infectious disease or from lack of repairs. **The tenant may be liable for double rent** as where he refuses to give up possession after the expiration of his lease.

In some states the furniture or other property of the tenant on the premises is subject to **a lien of the landlord for the rent,** that is the landlord can seize such property by proper proceeding and have it sold to satisfy the rent.

A tenancy may be terminated by the expiration of the lease in which case the tenant is not entitled to any notice; if he holds over after the term he may be liable for double rent; but where the premises are held on a lease from month to month, or year to year, **a notice to quit** must be given before the tenancy can be terminated. Notice to quit may be given either by the tenant or by the landlord entitled to possession and the service of a notice to quit must usually be made on the tenant or landlord personally, or it may be served upon someone whose duty it is to give it to the tenant or landlord,

as a member of his family over fifteen or sixteen years or an agent.

A tenant refusing to give up possession of the premises after his term has expired may be liable to a summary action brought by the landlord to recover possession called "forcible entry and detainer." The statutes of nearly every state provide summary and speedy methods for the recovery of possession of real estate by a party entitled thereto. The parties may agree upon the method for the termination of a tenancy and in such case the formalities specified must be observed.

CHAPTER XXVII.

LIENS.

A LIEN is the right of a person having possession of the property of another to retain it until some charge upon it, or some demand due him, is satisfied. It is the right to enforce a charge upon a specific thing by withholding possession from the owner until the charge is paid. It is also the right of a creditor to have a debt or charge satisfied by legal proceedings out of specific property, or its proceeds if sold, irrespective of having possession. **In other words a lien is a preferred claim against certain property,** or a charge by way of security against it, and for the satisfaction of which claim the property may be sold with or without legal proceedings according to the nature of the right. Thus a pawnbroker has a lien on goods pawned, which he may enforce by sale of the property without legal proceedings; a bank has a lien on stocks or other securities pledged to it; a common carrier has a lien for his charges on the goods carried; a corporation may have a lien on its stock for a debt due it from a stockholder, which lien may be enforced by sale of the property. There are other liens, the right to which exist by statute, such as a lien of a mechanic for work done on a building, or a material man for materials furnished for its erection, or a contractor for the price of the erection of the building. Such liens must be enforced by legal proceedings.

A lien can only be created with the consent of the owner under a contract express or implied with such owner, or even without his consent because of some statute. All kinds of property are subject to liens, although formerly liens existed only against personal property or chattels. The foundation of a lien is possession by the one entitled to it. As for example, if a wagon is taken to a shop of a mechanic for repairs the mechanic will have a lien on the wagon for his charges and he can refuse to give up the property until the debt is paid.

There are certain liens created by law as well as by contract. For example a contractor for the erection of a building, as well as those who furnished material for its construction, or

laborers engaged thereon, are entitled by statute to a lien on the building for the contract price in the one case, for the materials in the other, or for wages in the last mentioned instance. **In order to obtain the benefit of the mechanics lien law, the requirements of the statute creating it must be complied with.** Generally it is necessary that a claim or statement of the account be filed with the clerk of the court; that notice be given to the owner and that suit be brought on the claim, and all these acts must be done within the time and in the manner required by statute, when, in the proper proceeding in the proper court, judgment will be entered that the property be sold to satisfy the claim and the costs of the proceeding.

The seller of an article or of land may have what is called a "vendor's lien," but if the possession or title to the property has passed it cannot be enforced as against innocent purchasers, or those who have in good faith acquired a claim against the property without notice, and a vendor's lien must usually be enforced by obtaining a judgment against the debtor, in which case the property can be levied on and no exemption of such property against the execution can be claimed.

When a man pledges personal property to a pawnbroker, or to a bank, for a loan, the lender is given possession of the property and may retain it as against the owner until the debt is paid, or if the debt be not paid when due, he may sell the property, sometimes without notice to the owner but more often it is required by law that he publish a notice of the sale and sell it at public auction. If there is no requirement of law for such a notice, and the contract under which the loan is made provides that in case of default the property may be sold at either public or private sale without notice, such a provision is binding and will authorize a private sale of the property pledged. But in such case the seller must use reasonable effort to obtain the market, or a fair, price.

A lien may be created by rendition of a judgment against a debtor. In some states when a judgment is rendered it creates a lien against all of the real estate of the judgment debtor without the levy of an execution. In some states the rendition

of a judgment in a justice court creates a lien on the personal property of the debtor. Such lien is enforced by a levy under execution.

A lien may be created under attachment proceedings, as where property is seized for a debt under process issued by a court when the debtor has either fraudulently incurred the debt or is about to remove his property with intent to defraud his creditors, or for other reasons specified by law.

A hotelkeeper or innkeeper has a lien on the baggage of his guest for his charges. A **stable man has a lien** on the horses entrusted to his keeping for his charges for care furnished and food supplied. **The boarding house keeper** is often given by statute a lien for his charges. Statutes generally provide how such liens may be enforced, that is under what conditions a sale may be had of the property to pay the debt.

CHAPTER XXVIII.

MORTGAGES.

MORTGAGE is the name given to an instrument by which either real estate or personal property is pledged to another for a loan of money, or as security for the performance of some obligation. The party making the mortgage is called the **"mortgagor,"** the one to whom it is given is called the **"mortgagee."** A mortgage of land is generally an absolute conveyance by the mortgagor to the mortgagee to become void if the obligation is performed or the debt is paid. Sometimes the mortgage is in the nature of a trust deed, that is the property is deeded to someone in trust to be sold by him if the debt is not paid either in the manner provided in such deed or by virtue of a legal proceeding in court. When personal property is mortgaged the instrument is called a **"chattel mortgage."**

It is not necessary in order to create a mortgage for any particular form of words to be used as any instrument whereby an intent appears to convey the land as security for a debt, or to create a lien thereon, will amount in law to a mortgage, and even an absolute deed of the entire interest in property may, in a proper proceeding in court, be shown to be a mortgage and the owner upon payment of the debt be entitled to have the property reconveyed to him.

No instrument can be construed to be a mortgage in which the mortgagee does not have the right to foreclose, that is to sell the property conveyed if the debt be not paid, or the duty specified therein be not performed, and the reciprocal right on the part of the mortgagor to have the property reconveyed to him if he does perform the duty or pay the debt. There is a rule of law to the effect that if an instrument is once shown to be a mortgage it never becomes anything else and the right of the mortgagee to redeem will continue until such right is cut off by forclosure of the mortgage or the property is redeemed.

The validity of a mortgage is determined by the law of the place where the property is situated, even though it is executed

in another state where the parties reside. Generally, while a mortgage is valid as between the parties without being recorded where the land or other property covered by it is situated, yet an unrecorded mortgage will not be upheld as against any party who in good faith has bought the land without notice of the mortgage, or as against a creditor who may have levied an execution on the land. It follows that every instrument in the nature of a mortgage whether called such, or a deed of trust, should be recorded as soon as executed. The statutes of every state generally provide how a mortgage of real estate should be executed, that is the parties making it should appear before a certain officer, as a notary public, or a clerk of court, and execute before him what is called an **"acknowledgment,"** that is such officer must certify that on a certain day the parties named in and who executed the mortgage, known to him to be such, appeared before him and acknowledged the instrument to be their free act and deed, or that they executed the same freely. This certificate, attached to the instrument which is signed by the parties, entitles it to be recorded. The same rules in regard to mortgages of personal property exist in some states. The same mortgage may cover both real and personal estate and all property which is assignable, or the subject of a contract, may be mortgaged, that is the mortgagee will acquire a lien on whatever interest the mortgagor has in such property.

The mortgagor must always be a party capable in law of making a contract, that is a minor cannot mortgage land or personal property, neither can one who has been declared insane, and in order for a party to give a valid mortgage, he must also have some title to or interest in the property. A mortgage can be executed by an agent, if the authority to such agent, or a power of attorney to him, be in writing and such writing must be recorded with the mortgage. In case a power of attorney is executed the agent is called an **"attorney in fact."**

There must always be a consideration for a mortgage, because if there is no debt, or obligation to be performed, no consideration exists for the mortgagee and it may be set aside in a

proper proceeding for the purpose brought by some creditor or by the mortgagor himself. If the mortgage be given for an illegal consideration, that is to secure a gambling debt, or to secure a debt which could not be enforced at law, it is in some cases absolutely void, or under other circumstances it is voidable only and may be cancelled by a suit at law according to the nature of the consideration.

A mortgage may be given for an existing debt or to secure future advances. It may be partly void, that is it may stand as security for a debt actually due, and be unenforcible as to an illegal debt, or future advances when mortgages under a statute given for future advances are declared invalid.

While no particular form is necessary to constitute a mortgage of land it is necessary that a plain intent should appear to charge the land, or property, with a lien to secure the payment of a debt or performance of an obligation, and the nature of the debt or obligation; and the time when it is to be paid, or the time when the obligation is to be performed must be set forth with reasonable particularity. Where an instrument is so uncertain that no one can tell what it means it may be held to be worthless and void. **The property must be described with reasonable certainty** so that it can be identified, because, although the mortgage may be perfectly good in other respects, yet if the description of the property is so uncertain that no one can understand where it is, or identify it, the mortgage is of no value and may be held void.

A mortgage creates a lien on the property described therein to the extent of the interest of the mortgagee, subject to all existing rights, liens and encumbrances of third parties. A mortgage, if not recorded soon enough may become a second lien because an instrument executed later was placed on record first. **There must always be a delivery of the mortgage.** A mortgage sometimes may cover property which the mortgagor does not own but afterwards acquires. **A mortgage of land carries with it the buildings on the property,** or other improvements, and such machinery or articles in the building which

are attached to it and form part of it. Such articles are called **"fixtures,"** as mantelpieces in a house.

Mortgages may be assigned and transferred as other property. If the law requires an assignment of a mortgage to be recorded the law must be complied with, but usually a mortgage passes by delivery, or assignment, in any manner whereby an intent to transfer ownership appears.

When the debt secured by the mortgage is paid, or the duty to secure performance of which the mortgage is given, is performed, it is the **duty of the mortgagor to execute a proper release or satisfaction of the mortgage** and deliver it to the mortgagor. The mortgagee can also release part of the land mortgaged, retaining the lien on the remainder of the property. Payment of the debt always entitles the mortgagor to a reconveyance of the property. The mortgagee is liable for damages caused by a refusal to execute a release, or satisfaction, of the mortgage after it is paid.

If a mortgage be not paid, although it may be an absolute conveyance on its face, **the right of the mortgagor to redeem the land, or pay the debt secured by the mortgagage, must be foreclosed or cut off by foreclosure proceedings in order to terminate his right.** Sometimes the mortgage itself provides how the land may be sold in case of a breach of condition, but generally the method by which mortgages and deeds of trust may be foreclosed is prescribed by statutes. In some states the mortgagee in case of default is entitled to advertise and sell the property at auction, and after such sale the purchaser acquires the interest conveyed by the mortgage. The mortgagee can also bring what is called a **"foreclosure suit"** in a court, asking to have the property sold for the payment of the debt by the sheriff, or someone appointed by the court, for the purpose of making the sale. In most states the mortgagee can select any one of the remedies provided by statute he may prefer, that is either forclosure by an advertisement in a newspaper or a proper suit. In case he elects to foreclose by advertisement, in order to make a valid sale and cut off the rights of the mortgagor, all the requirements of the statute

must be performed, that is if the statute says that the advertisement shall be published for twenty-one days, the sale will be void if the advertisement is only published for twenty days. The advertisement must be in a newspaper published in the county where the land is situated.

Sometimes after foreclosure sale **the mortgagor has a certain time within which he can redeem,** that is if he comes in within the specified time and pays the debt and the costs and expenses, he entitled to have the property conveyed back to him. This right, which is called **"equity of redemption,"** is usually conferred by statute.

CHAPTER XXIX.

NEGOTIABLE INSTRUMENTS—COMMERCIAL PAPER, NOTES, DRAFTS AND CHECKS.

THE word, "negotiable," means capable of being transferred by assignment, sale, indorsement, or delivery. An instrument to be negotiable must have the following characteristics: it must be in writing and signed by the maker or drawer; must contain an unconditional promise, or order, to pay a sum certain in money; it must be payable on demand, or at a fixed and determinable future date; it must be payable to order or to bearer, and, if it is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty.

The sum payable is certain, although it is to be paid with interest or in stated installments, or by stated installments with the provision that upon default in payment of an installment, or of interest, the whole shall become due; or with exchange, either at a fixed rate or the current rate, or with costs of collection, or an attorney's fee in case payment shall not be made at maturity.

An unconditional order, or promise, to pay may be coupled with an indication of a particular fund out of which reimbursements are to be made; or a particular account to be charged with the amount; or a statement of the transaction, which gives rise to the instrument. An order, or promise, to pay out of a particular fund is not unconditional.

An instrument is payable at a determinable future time, which is expressed to be payable at a fixed period after date, or on or before a fixed or determinable time specified therein, or on or at a fixed period after the occurrence of a specified event, which is certain to happen though the time of happening be uncertain, as upon the death of a person. An instrument payable on a contingency, as if Smith outlive Jones, is not negotiable and the happening of the event does not cure the defect.

An instrument which contains an order, or promise, to do any act in addition to the payment of money, is not negotiable

although the character of an instrument otherwise negotiable is not affected by a provision which authorizes the sale of collateral securities pledged for payment, in case the instrument be not paid at maturity, or authorizes a confession of judgment if the instrument be not paid at maturity, or waives the benefit of any law intended for the advantage, or protection, of the obligor, or gives the holder the right to require something to be done in lieu of payment of money.

The validity or negotiable character of an instrument is not affected by the fact that it is not dated; or does not specify any value given; or that value has been given therefor; or specify the place where it is drawn, or where it is payable, or bears a seal or designates a particular kind of current money in which payment is to be made.

An instrument is payable "on demand" where it so states. Where an instrument is issued, accepted, or indorsed, when overdue it is as regards the person issuing, accepting or endorsing it payable on demand. **The instrument is payable "to order" when it is drawn payable to the order of a specified person, or to his own order,** and it may be drawn payable to a third party, or the drawer, or maker, himself, or the drawee, or to two or more persons jointly, or to one or some of the several parties, or the holder of an office for the time being. **Where the instrument is payable to order, the payee must be named,** or otherwise indicated with reasonable certainty. **The instrument is payable "to bearer" when so stated on its face,** or to a person named therein as bearer, or when it is payable to the order of a fictitious person and such fact was known to the person making it, or when the name of the payee does not purport to be the name of any person, or when the only or last indorsement is what is called an "unrestricted indorsement," that is where the payee simply writes his name on the back of the instrument.

The instrument is not invalid for the reason only that it is ante-dated, or post-dated. Usually where an instrument that is payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after

sight is uncertain, any holder may insert therein the true date of issuance, or acceptance. Insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course of business, but as to him the date so inserted is to be regarded as the true date.

Where there are blanks left in a particular printed or written form, or where an instrument issued is on a blank piece of paper and signed, but the form not filled up, the person in possession thereof ordinarily has authority to complete it by filling up the blanks or can fill up the blank paper so as to make it a negotiable instrument.

While an instrument may not be negotiable by law it may still be assigned but the assignee takes it subject to any defense the maker may have, while in the case of negotiable instruments the assignee takes them, if bought before maturity, free from such defense.

The law of negotiable instruments arose from what is called the **"law merchant,"** that is from the customs and methods of doing business of merchants and traders, and the statutes and rules of construction adopted by courts practically give effect to the customs and usuages which have grown up among merchants and traders in regard thereto. Negotiable instruments may be promissory notes, bonds issued by municipalities, such as cities, counties, school districts or states, or business corporations, such as railroad and telegraph companies, checks and drafts. The usual name in law for a draft is a **"bill of exchange."**

A negotiable instrument is incomplete until its delivery, but when once delivered it passes out of the control of the maker. **Where the language of the instrument is ambiguous, or there are omissions, the following rules apply:** if the sum payable is expressed in words and in figures and there is a discrepancy between the two, the sum denoted by the words is payable; but if the words are ambiguous and uncertain, reference may be had to the figures to fix the amount; if the instrument provides for the payment of interest without specifying the date from which interest is to run, it runs from the date of the

instrument and if the instrument is undated from the issuance thereof; if no rate of interest is specified it bears interest at the legal rate; where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail; where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either; where a signature is so placed upon the instrument that it is not clear in what capacity the person making it intended to sign, it is to be taken as an indorsement and where the instrument is signed by two or more persons they are liable jointly and severally, that is both or either of them are liable. If the agent indicates in signing that he signs for his principal, as for example, signs a note "John Smith, By Peter Jones, Agent," the agent is not personally liable. Forged signatures have no force or effect.

Every negotiable instrument is deemed to have been issued for a valuable consideration and that every person whose signature appears thereon has become a party for value. Value is any consideration sufficient to support a simple contract. Absence or failure of consideration is a defense on a negotiable instrument as against the original payee, or any person taking it after maturity. **An accommodation party** to a negotiable instrument is one who has signed it or indorsed it without receiving any value therefor for the purpose of loaning the credit of his name to some other person. An accommodation maker, or indorser, is liable on the instrument to anyone who has taken the same in good faith before maturity. An instrument is negotiated when it is transferred from one person to another, if payable to bearer by delivery, if payable to order by indorsement of the payee and delivery.

A blank indorsement is where the payee simply writes his name on the back of the instrument, or on a paper attached thereto. It is **restricted** when it is made by indorsement payable to a certain party, or the indorsement may be **qualified** as when the instrument is indorsed "**for collection,**" and the indorser may shield himself from liability by adding before his signature the words "**without recourse.**" If the in-

strument is payable to two or more parties, all must indorse unless one has authority to indorse for the others. If the name of a payee is wrongly spelled, he should indorse the name as incorrectly spelled and then write his name correctly right below it.

The holder of a note may strike out any indorsement which is not necessary to his title and the indorser whose name is stricken out, and all indorsers subsequent to him, are thereby relieved from liability. A negotiable instrument may be transferred for value without indorsing it, but the transfer only gives such title as the person who transferred it had.

A holder in due course is one who has taken the instrument under the following conditions: that it is complete and regular upon its face; that he became the holder of it before it was overdue and without notice that it had been previously dishonored if such was the fact; that he took it in good faith and for value and at the time he so took it had no notice of any defect in the title of the person negotiating it, or any infirmity in the instrument. A holder in due course holds the instrument free from any defect of title of parties who held it before and may enforce payment for its full amount. **A non-negotiable instrument,** or one taken after maturity, is subject to all the defenses that existed between the original maker and the payee.

A person drawing a negotiable instrument by doing so admits the existence of the payee and that he is one who has capacity to indorse and engages that on due presentment the instrument will be accepted or paid and that if it be dishonored, and the necessary proceedings on dishonor taken, he will pay the amount to the holder, or to any subsequent indorser who may be compelled to pay it. A **person who accepts the instrument,** such as a draft, engages to pay it and admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw it, and the existence of the payee and his capacity to indorse. **Any person who signs his name upon an instrument otherwise than as maker and drawer, or acceptor, is deemed to be an indorser.** If a person not a party to an instrument places his signature thereon in blank

before delivery he is liable as indorser. Every person negotiating an instrument by delivery, or by qualified indorsement, warrants that the instrument is genuine and is what it purports to be; that he has a good title to it; that all parties indorsing before had capacity to contract and that he has no knowledge of any fact which would render it valueless. Indorsers are liable in the order in which they sign their names.

Presentment for payment is not necessary in order to charge the person primarily liable on the instrument, but if it is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part so that it will not thereafter carry interest. **Otherwise presentment for payment is necessary in order to charge the drawer and indorsers.** If the instrument is not payable on demand, presentment must be made on the day it falls due and if on demand a reasonable time after its issue, except in the case of a "bill of exchange" which may be presented for payment within a reasonable time after the last negotiation thereof. Presentment for payment to be sufficient must be made by the holder, or some person authorized to receive payment, and at a reasonable hour on a business day, and at a proper place and to a person primarily liable on the instrument, or if he is absent to any person found at his place of business.

If an instrument is payable at a specified place, it must be presented there, but if no place of payment is specified, if the address of the person to make payment is given, it may be there presented, and if no place of payment is specified and no address given it may be presented at the usual place of business or residence of the person to make payment, or it may be presented to the person obliged to make payment wherever he can be found, or at his last known residence or place of business. The instrument must be exhibited to the person from whom payment is demanded and when it is paid must be delivered up.

The instrument is dishonored by non-payment when it is duly

presented for payment and payment is refused or presentment is excused or the instrument is overdue and unpaid.

Sometimes what is called **"days of grace"** are allowed, that is if an instrument is payable on a day certain the person bound to pay it can make payment within three days thereafter but in most states days of grace are abolished. If the instrument is payable at a fixed period after date, the time of payment is determined by excluding the day from which the time is to begin to run and including the day of its payment. If an instrument is payable at a bank, it is equivalent generally to an order to the bank to pay it.

If a negotiable instrument, such as a note, check or draft is not paid when presented, in order to hold the indorsers **such instrument must be "protested" for non-payment. A protest** is a certificate from a notary public that he presented the note for payment at the place where it was payable and payment was refused and that he has given notice of such non-payment to the indorsers.

Notice to an authorized agent is notice to his principal and notice of dishonor may be given by mail.

A negotiable instrument is discharged by payment or by the intentional cancellation thereof by the holder, or by any other act which will discharge a simple contract.

When a negotiable instrument is altered in a material feature without the consent of all the parties liable thereon, it is made void, except as against the party who has himself made, or authorized, or consented to the alterations. Any alteration is material which changes the date, or the sum payable, or the time or place of payment, or the number or relation of the parties, or the currency in which payment is to be made, or adds a place of payment when none is specified, or any other change which alters the effect of the instrument.

A "bill of exchange," or draft is an unconditional order in writing addressed by one person to another signed by the per on giving it, called the "drawer," requiring the person to whom it is addressed, called the "drawee," to pay on demand, or at

a fixed or determinable future time, a sum certain in money to the order of a named person, or to the bearer, called the "payee." The drawee is not liable on the bill unless he accepts it. A bill may be addressed to one or more drawees jointly, but not to two or more in the alternative or in succession.

An inland bill of exchange is one which is payable within a state or country. Any other is a foreign bill. If the drawer and drawee are the same person, or if the latter is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument either as a bill of exchange or a promissory note at his election.

The acceptance of a bill of exchange is made by the person to whom it was addressed, or drawee, writing his name across the face of the bill prefixed by the word "accepted" with the date and such acceptance may under some circumstances be written on a paper other than the bill itself as by a memorandum signed by the acceptor to be attached to the bill.

Usually the drawee is allowed twenty-four hours after presentation in which to decide whether or not he will accept the bill, but if he does accept it it dates as of the day of presentation. If the drawee destroys the bill, or refuses within twenty-four hours to return the bill accepted or unaccepted, he will be deemed to have accepted the same. A bill of exchange may be accepted before it is signed and the acceptance may be qualified or may be general. **A general acceptance** consents to all the terms of the bill but a **qualified acceptance** is where the drawee imposes some additional condition, or accepts it only for a smaller amount. The holder of a bill of exchange may refuse to accept a qualified acceptance and demand that unqualified acceptance be made or refused,

Presentment is necessary in order to fix the maturity of the instrument. It must be made within a reasonable time, at a reasonable hour, on a business day and if two or more drawees are named, presentment must be made to all. It must not be presented on a holiday or Sunday and the holder must exercise due diligence to present the bill for acceptance before presenting it for payment. Presentment for acceptance is excused

where the drawee is dead, or has absconded, or is a fictitious person, or where after the exercise of reasonable diligence, presentment cannot be made.

Where a bill is duly presented for acceptance and is not accepted within the prescribed time, **if the holder wishes to have recourse to the indorsers, he must give notice of the same** to the indorsers and usually the bill is protested in the same manner as a note.

The protest of a negotiable instrument, either promissory note or bill of exchange, must be either annexed to it or contain a copy thereof, must be under the hand and seal of a notary and specify the time and place of presentment, how it was presented, the cause, or reason, for protesting the bill, the demand made and the answer given by the drawee, or that he could not be found.

A protest may not only be made by a notary, but by any respectable person in the place where the bill is dishonored in the presence of two or more creditable witnesses. When a bill is protested, protest must be made on the day of its dishonor and it must be protested at the place where it is dishonored. Indorsers on a bill of exchange are usually liable in the order in which their names appear.

A negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, to order, or bearer, a certain sum of money, and if a note is drawn to the maker's own order, it is not complete until he indorses it.

A check is a bill of exchange drawn on a bank, payable on demand, and must be presented for payment the same day of its receipt, or within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay; that is if the check be not presented for two or three days, and it would have been paid if presented at once but meantime the bank fails so that the check is not good, the loss falls on the holder. Ordinarily a check of itself does not operate as an assignment of any part

of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder until it accepts or certifies the check. The maker of a check may stop payment of it before it reaches the bank.

All negotiable paper falling due on a holiday or Sunday is payable on the succeeding day.

A "due bill" and an **"I. O. U."** are popular forms of a memorandum of a debt. The former may simply say "Due Tom Jones ten dollars, John Smith." In such case a promise is implied to pay Jones the sum mentioned on demand. It may add a statement of when the money is payable. The letters "I. O. U." followed by the mention of a sum of money, and a signature, mean that the person signing owes the person to whom it was given the amount stated which is payable on demand. If a due bill says "Due Tom Jones, or order (or bearer) ten dollars," it amounts to a promissory note.

Form of promissory note. The following is a usual form of a promissory note:

Detroit, Mich., June 23, 1913.

"$100.

Six months after date for value received, I promise to pay to John Smith, or order, one hundred dollars with interest from date at six per cent. Payable at the First National Bank of Detroit.

Henry Jones."

The note instead of saying "or order," may say "or bearer," or say "to the order of John Smith," instead of "John Smith or order." It may also say instead of "interest from date," "interest after maturity," or "after due;" or mention no place of payment.

Form of check. The following is the usual form of a check:

"$10. Detroit, Mich., June 23, 1913.

First National Bank of Detroit, Mich. Pay to the order of John Smith ten dollars.

Henry Jones."

Form of draft or bill of exchange. The following is the usual form of a draft or bill of exchange:

"$100. Detroit, Mich., June 23, 1913.

At sight pay to the order of John Smith one hundred dollars and charge the same to my account.

Henry Jones.

To Peter Jackson,
Boston, Mass."

(For further information as to checks see the subject Banks and Banking.)

CHAPTER XXX.

NUISANCE.

IN accordance with the maxim of law that no one can use his property in a manner which causes damage, material annoyance, or inconvenience, to another, or which prevents the reasonable use of his property, arises what is called the law of "nuisance." A nuisance is anything that unlawfully causes hurt, inconvenience or damage to another in the enjoyment of his property. To constitute a nuisance in the use or condition of premises, some public or private right must be violated and with the result of causing annoyance, inconvenience, or injury because of the invasion of such right.

A nuisance may be either "public" or private." In the former case it affects the rights to which every citizen is entitled as a part of the public, whereas a private nuisance is something that is done to the annoyance or detriment of the lands, or dwellings, of another, not amounting to what is called a "trespass" or actual invasion on such property. **A nuisance in law is an act, or occupation, or condition of premises, or structure, which causes annoyance or injury to health, or danger to people in the locality;** for example, a gambling or disorderly house; or keeping a dangerous animal known to be such and suffering him to go at large, as a large bull dog accustomed to bite people; or exposing a person afflicted with a contagious disease in public; or leaving unburied a corpse for which the defendant was bound to provide burial; or conducting an offensive business like a soap factory; or acts of public indecency. **A thing may be a nuisance in one place, which is not in another,** as for example, a man may maintain a soap factory, or slaughter house, in the fields away from the town, but if the town grows so that the adjacent land is occupied for dwellings then it will become a nuisance.

The motive of a person who erects and carries on an offensive occupation or occupies a building for offensive purposes, is immaterial.

It is not always easy to determine what is a nuisance, but as a general rule any use of premises which of itself or by its use

directly injures a neighborhood is a nuisance. A saloon has been held to be a nuisance if established in a high class residence neighborhood. Every person who lives in a city, or town, must submit to certain inconveniences caused by the neighbors in the use of their property, as a blacksmith shop, but one cannot establish a trade or business in a residence locality which unreasonably depreciates the value of adjacent property, or interferes with the reasonable enjoyment of the property of the neighbors, for example, a gambling or bawdy house is a nuisance in itself; and the keeping of bees in a residence locality so that they are a source of annoyance; and the ringing of a heavy factory bell; or dangerous cellar doors; or a hospital for contagious diseases, all may constitute a nuisance. The discharge of sewerage with refuse may be a nuisance, and a place for the manufacture and storage of explosives. Sometimes a factory is a nuisance, or a garbage plant. Obscene and ribald conduct is a nuisance, so is any obstruction upon a street or highway, or the obstruction of a navigable stream, or causing water to overflow upon adjacent property, or the pollution of a stream of water. The maintenance of a factory in a manner so as to create offensive odors or cause dust or dirt, or soot, to be carried into houses, or make loud noises, may sometimes be a nuisance, and so is anything which causes an offense to public decency. So is causing noxious smells, or jarring of a person's premises by vibration of heavy machinery; indeed anything which causes continual danger to life or limb, may be a nuisance, or anything which causes injury to health, or interferes with the reasonable enjoyment of adjacent property.

Any person who actually creates a nuisance is liable for all damages resulting therefrom and he may be compelled to desist by an injunction.

A public nuisance as a rule does not furnish ground for an action at law by an individual who merely suffers an injury which is in common to the general public, as the occupation of a street by railroad tracks, but if he suffers an injury peculiar to himself he may sometimes have the right to maintain an action, but the special injury must be of a substantial character.

In ancient times **a man who suffered from a nuisance could maintain an action** against the one who caused it, or under some circumstances **he had the right to abate the same by his own act,** as for example if a dangerous bull dog should be running at large anyone in danger of being bitten has the right to kill it, or he may kill a dog which haunts his premises and by barking and howling becomes a nuisance, or he can cut off branches of his neighbor's trees which overhang his land. Ordinarily before a person can by his own act abate the nuisance **he must give notice** to the person causing it to remove it and anyone who undertakes to abate a nuisance, and so become a judge as to its existence, acts at his peril and may subject himself to criminal prosecution or to respond in damages.

The ordinary course to pursue for the removal of a nuisance is to take legal advice and bring an action in the proper court, and no general rules can be laid down to govern all cases.

CHAPTER XXXI.

PARTNERSHIP.

A PARTNERSHIP, or co-partnership as it is sometimes called, is a contract between two or more persons competent to make it to combine their money, effects, labor and skill, or some, or all of them, for the purpose of engaging in lawful commerce or business and to divide the profits, or bear the losses, in certain agreed proportions. It is a relation which exists because of an express or implied agreement between two or more persons to carry on a business for their common benefit. **No particular form of contract is necessary to create a partnership,** it may be in writing or oral, or it may result from the actions or conduct of the parties as by leading people to believe they are partners. In some states the statutes require a partnership agreement to be in writing duly executed and recorded. The parties must be competent to contract and in some states certain parties rest under disabilites which forbid a partnership as married women, infants, foreign enemies, or corporations, although an infant can make a partnership agreement, subject to revocation when he reaches his majority.

A partnership can be formed for any lawful purpose or for carrying on any lawful business, and the effect of the agreement is that the parties combine their capital and labor and divide the profits, or share the losses, in agreed proportions. Members of a voluntary association under some circumstances may be partners. **A partnership cannot be formed for the prosecution of an illegal business, or for the conduct of a lawful business in an illegal manner,** and in such case the courts will not recognize its existence, either by compelling the partners to account to each other, or enforcing its claims against third parties. In an action by a partnership, if the court discovers that the business is illegal, it will refuse to give relief, even though the illegality be not set up by either party.

To constitue a partnership, there must be either an agreement of the parties to be partners, or it must result as a necessary consequence of their acts, as for example, holding themselves out

to the public as partners. It is generally a question of the intent of the parties and an agreement may be so uncertain and vague that the court will not hold it to be a partnership. Usually **any agreement between two or more parties by which they engage in business with the intent to share the profits** is in law a partnership and if losses result each partner will be liable. Sometimes, although one party receives a share of the profits as compensation for his work, or services, he may not be held to be a partner, as where a traveling salesman in addition to his salary is to receive a certain percentage on his sales, but if one by his conduct holds himself out as a partner and induces others to deal with him and his associates in that capacity, he cannot afterwards claim that there was no partnership. Any conduct on the part of a person which leads others to suppose that he is a partner, will justify a court in holding him liable to the party who is misled for any loss he may incur in consequence or for any obligation incurred on the strength of such conduct.

The law in some states recognizes what is called a "special" partnership, that is several persons may agree to form a special, or limited, partnership; that one shall contribute a specified sum and if notice of such limited partnership is given in the manner provided by statute, as by publication of a notice to that effect in a newspaper, the partner who contributes the specified sum of money will not be liable beyond the extent of the sum contributed. He is called a **"special partner"** and the others are called **"general partners,"** and the general, but not the special, partners are liable if losses ensue which are not covered by the capital contributed.

Any name may be adopted for a partnership, if not forbidden by statute, but the partnership cannot bring suits in such name, but suit must be brought in the name of the individual partners, and if a partnership is sued the names of the partners must be set forth. The persons organizing a partnership have the right to use their names honestly as the firm name although other persons of like name carrying on a partnership in the same style, may suffer loss of business in consequence.

Everything which is contributed by any partner to the capital stock is firm property and so are the profits acquired in the business.

The obligations of partners are that each partner will act in the utmost good faith toward the others and will comply with the terms of the partnership agreement, whether the agreement is in writing or oral. Parnership articles usually contain a provision that each partner shall give his entire time to the service of the firm and the partners will be entitled to the profits in the proportions agreed upon. A partner cannot engage in business antagonistic to that of his firm, nor can he use the partnership property for the payment of his own debt, nor can he pledge the credit of the partnership for the payment of his individual debt. One member of a firm cannot without the consent of his co-partners gain secret profits from the business of the firm, nor engage in any transaction which is fraudulent toward the firm, or his fellow partners, and if he acquires secret profits he must account to the partnership for them.

Usually each member of the firm is personally liable for its debts and each member of the partnership is bound by the act of each individual composing the firm, as regards the business conducted. The partnership agreement may limit the authority of each partner, but such restrictions do not bind outside parties who have no notice of such limitation if the act done is within the apparent scope of the authority of the partner. **Each partner has the implied authority to bind the firm** and each member by contracts and obligations executed in the firm name, which are within the scope of the business usually carried on by the firm. Each member of the firm has an implied authority to dispose of the entire property of the firm, if such transfer is made in due course of business, but such a disposal of property may be a fraud on the partners who do not consent to it, and will vest the purchaser only with the interest of the partner who conducts the transaction. Each partner has implied authority to borrow money on the credit of the firm, to receive payment of debts due it, but a partnership is not obli-

gated for the individual debts of its members, nor can an individual partner pay his own debt by setting off against it the amount due the firm from his debtor. Each member of the firm has the power to execute notes and sign checks, unless such authority is taken away from him by the partnership agreement and the person dealing with him has notice of such want of authority. One partner cannot give a partnership note in payment of his own debt, but if such note is negotiated before maturity, it may be binding on the firm. A partnership has no right, unless all the partners agree, to become security, or surety, for another, nor to make accommodation paper, that is endorse a note for the accommodation of a friend of the individual partner.

A firm is liable for the wrongful acts of a partner while acting in the ordinary course of the business carried on by the firm, or by authority of his fellow partners.

One partner can sell his interest in the firm, but if such a sale is not provided for in the partnership articles, it will amount to a dissolution of the firm. One member of the firm can retire and sell out to his associates and thereby the seller loses all interest in the partnership property. In the absence of an agreement between the partners providing for the death of a partner such death will work a dissolution of the firm and thereupon arises the duty on the part of the surviving members to liquidate its business and account to the personal representatives of the deceased partner for his interest in the partnership. **One partner can dissolve the partnership at any time,** even though the articles provide that it shall continue for a specified period which has not elapsed, but in such case he may be liable to his associates for damages. In most states statutes provide how the affairs of a partnership may be wound up in case of the death of a partner, so that the surviving partner becomes the administrator of the partnership estate and can proceed to wind up the business, accounting for what is left after the debts are paid.

The good will of a firm, that is the probability, because of long continued business and high reputation in the trade, that

the customers will continue their patronage, is an asset of the partnership to be accounted for on its dissolution.

When a partnership is dissolved, the partners are bound to wind its affairs up as speedily as possible and, after payment of its obligations, divide the residue in the agreed proportions.

CHAPTER XXXII.

PATENTS, TRADEMARKS AND COPYRIGHT.

Patents.

ANY person who invents or discovers any new or useful art, machine, manufacture, or composition, or process; or any new and useful improvement thereof, or any new original and ornamental design for any article of manufacture, is entitled upon compliance with the regulations and laws regulating the issue of patents to receive **an instrument issued under the authority of the United States,** granting to the inventor, or designer, his heirs, or assigns, for the term of seventeen years the exclusive right to make, use and sell his invention throughout the United States and its territories. **This instrument is called "letters patent."** The object of the patent laws of the United States is to secure to an inventor of some new and useful article **a monopoly for a specified period** of the right to manufacture and sell his invention. No one has a right to use such patented invention, or discovery, not even the United States, without the permission of the owner, during the life of the patent.

A mere idea cannot be patented, but only the means for using it. The discoverer of a new substance, or principle of nature, cannot patent it but he can secure a patent for the means devised for utilizing the principle, as for example a method of applying electricity to the moving of vehicles. **A man can secure a patent for a process** and this process is separate and independent of any machine or apparatus used in performing it. **He can patent either a chemical or mechanical process.** Usually however patents are issued for some combination of devices called a "machine", or some article for popular use, or an improvement on some other machine or article.

It is necessary in order to secure a patent that the subject matter must be new or novel, that is never used or known before, and it must be useful. This newness, or novelty as it is called, may be either in the use of the old means in a new way, or changes of shape or form so as to produce new functions, or a new combination. Nothing can be lawfully patented

that has been in public use or known before, nor can one patentee of an improvement in a machine use such new process on the old machine, if that is patented, without permission of the owner of the patent, neither can the owner of the patented machine use a new improvement without the permission of the owner of the patent on such improvement.

It is not easy to concisely state all the various principles of law applicable to patents other than giving **a general statement of a few governing principles.** Thus a man cannot obtain a patent merely because he has done what no one has done before, because mere novelty and utility are not enough to sustain a patent, but he must do something which an ordinary person skilled in the art would not know how to do if the occasion for it arose. This simplicity of the means employed does not operate against the patent, nor does mere complexity in the means employed show invention, nor the application of mere mechanical skill, nor a double use of an old means for a new but similar purpose, nor the substitution of one device for another which practically performs the same function.

The device, or art, or process, to be patentable must not only be novel, but it must be useful and adapted for practical use.

Only the original inventor, or if he is dead his executor or administrator, is entitled to a patent, and as between two original inventors the one first to make it in this country, or to apply, is entitled to receive the patent.

Patent law is complicated and nice questions of law are involved in the litigation arising over patents, and no inventor is safe in acting without the advice of an expert in that line.

One practical suggestion may be made here. Too often an inventor **assigns** his patent to a corporation in consideration of part of its stock, instead of giving the company a **license** to manufacture and sell the article on payment to the inventor of a percentage of the price by way of royalty. If the conveyance of the patent is absolute the company may fail and the patent may be sold and thus the inventor lose the benefit of his discovery, whereas if the company simply is given the right to manufacture and sell, the inventor retaining the owner-

ship of the patent, the successor of the corporation will either be obliged to continue under the old license, or obtain a new one. Any one using, or manufacturing a patented article without the consent of the owner of the patent is **liable to account to such owner for the profits or pay damages.**

Trade Mark.

A Trade Mark is a distinctive name, word, mark, emblem, design, symbol, or device, used in lawful commerce to indicate, or authenticate, the source through which has come, or through which has passed, the article upon or to which it is affixed. A trade mark is used by a manufacturer or merchant to distinguish his goods from those manufactured or sold by another, so that they may be known in the market and enable him to secure the advantages that result from a reputation acquired by the superior quality of the article.

A manufacturer for example who has manufactured a special blend of coffee which has become widely and favorably known, and which is put up in packages marked in a peculiar way, and has acquired a large and extensive patronage, is entitled to retain its advantages and the law will not allow any competitor to manufacture and put on the market a package substantially similar so as to mislead a purchaser into believing that he is obtaining the original, genuine article, when in fact he is obtaining an imitation. The public is entitled to protection against imposition, because of an unauthorized imitation of manufactured goods by unscrupulous men who desire to obtain the benefit of the reputation of an article by selling an imitation. A man is entitled to the good will of his business.

A trademark can only be acquired on some article of manufacture, that is, something which is bought and sold in the market. A trademark is an exclusive right to be enjoyed by the person who first used it as a distinguishing brand for his article. A trademark conveys no monopoly, or exclusive right, in the goods to which the maker has applied it, but extends so far as to prevent competitors imitating the brand or mark so as to mislead the public. Only a person who has some

connection, or dealing, with the goods to which the mark is applied is entitled to a trademark, and it is acquired by mere continued use and occupation.

The laws of the United States provide for the registration of trademarks.

Any word, mark, or device, used for identifying specific goods may constitute a valid trademark, but it must indicate a distinctive origin, or ownership, of the goods to which it is applied so as to distinguish such goods from similar goods of others. Usually a trademark is some symbol, or device, or some arbitrary word. One of the best examples of an arbitrary word is "kodac," as applied to a photographic apparatus.

If the trademark contains misrepresentation, or is calculated to deceive the purchaser, the user may subject himself to the penalties provided by law and under no circumstances can he receive any relief from a court against competitors who have imitated his wares or article.

Merely descriptive words cannot be appropriated as a trademark; there must be some arbitrary, or fanciful, term, figure or device, not descriptive of the goods. Words, marks, or names, which simply indicate the quality, style, or character, or class of the goods to which they refer cannot constitute a trademark, nor marks merely indicating superior qualities, as the words "favorite," "standard," or "best." Mere geographical names cannot be monopolized in this way, and individual names only under exceptional circumstances. Any device, or symbol, or character, may be used as a trademark which is arbitrary in its character and does not necessarily describe the goods upon which it is placed. A combination of words and phrases may be used.

The law forbids the infringement of a trademark by competitors and no person can imitate or copy the trademark of another, even though it be not copyrighted, or registered, as a trademark or patent. He cannot imitate it so nearly as to make the imitation liable to deceive the public. If he does he may be enjoined from its use and made to pay damages.

The law forbids what is called "unfair competition," which is an attempt to pass off on the public the goods, or business, of one person as and for those of another, and if the trademark, or device, used by a merchant, or manufacturer, is so closely imitated as to be calculated to deceive, the courts will protect the original manufacturer by enjoining such unfair competition and making the offender account for all profits. The reason for the rule is that anyone who has built up a good will and reputation for his goods, or business, is entitled to all the benefits thereof. Such right, or good will, is property and the owner will be protected in the enjoyment thereof, and the wrongdoer made to pay damages and account for any profits he may have made by the unlawful use.

The law of trademarks, like that of patents, is somewhat complicated and only a few general principles can be here stated.

Copyright.

The laws of the United States give the author of any book, map, engraving, photograph, painting, model, or design, or musical or dramatic composition, an exclusive right to multiply and sell copies thereof, or to perform any play or drama. This right is secured by the national law of copyright and if the law is complied with by recording the title, or name, and depositing the required number of copies, with the Librarian of Congress, a certificate of copyright is issued which gives the owner, or designer, the exclusive right to multiply and sell copies for the term of twenty-eight years, and at the expiration of such term the author, inventor, or designer, if he still be living, or his widow or children, if he be dead, have the right to continue this exclusive right for the further term of twenty-eight years by recording the title of the work and description of the article with the Librarian of Congress, and complying with other regulations of law within one year before the last day of the first term, that is one year before the original copyright expires.

Any literary production may be copyrighted, as can maps, charts, dramatic compositions, stage directions and contriv-

ances for its production, musical composition, engravings, photographs and labels. In order to be copyrighted a work must be original in the sense that the owner has created it by his own skill or judgment without directly copying or imitating the work of another. If the composition is part new and part old, only the new part can be copyrighted. Illegal or immoral works are not entitled to copyright.

The author, inventor, or designer, of the composition, or production, is entitled to obtain a copyright, or two persons can obtain a joint copyright. This copyright may be sold as any other property or the owner of the copyright may license its production under such terms as may be agreed upon.

To obtain a copyright it is necessary that the person entitled to the same shall on or before the day of publication deposit with, or mail to, the Librarian of Congress a printed copy of the title of the book, map, or other production, or a description of the printing, drawing, statue, or model, and not later than the day of the publication deliver to, or deposit in the mail addressed to, the Librarian of Congress, two copies of the book or other production with the sworn statement required by the statute. A person obtaining a copyright must also give notice by inserting in every copy of the book, or map, or other production, the word "copyright," together with the year the copyright was obtained and the name of the party by whom its was taken out. There is a penalty imposed for inserting a false notice of copyright.

There is a great deal of technical law involved in a discussion of this subject and in determining what is an infringement on the rights of a person owning a copyright in a book or other production. Anyone claiming that his rights have been infringed, or desiring to learn more in regard to his rights, or liabilities, should take expert advice. The Librarian of Congress at Washington on application will supply the blank forms necessary to secure a copyright and give information as to the requirements of the law.

CHAPTER XXXIII.

REAL ESTATE.

PROPERTY is divided into two general classes, "real" and "personal." In law the names, "realty," "real property," or "real estate," mean practically the same thing. In probably all the states rights in real property and the method of transfer of the title thereto, as by deed, are regulated by statute which defines what interest in lands shall be called real property, and by what persons and in what manner conveyances of land shall be made and the formalities required for the execution of deeds. In this country a system of recording conveyances of lands prevails and conveyances are required to be recorded in an office and in books provided for the purpose in order to perfect the title. There is a system of registration of land titles, called the **"Torrens System,"** which is intended to protect and simplify titles to real estate.

The law in regard to real estate, or real property, is complicated because it is a modification of the English law which has come down to us through the centuries; it is complicated and difficult to understand because of the ancient ideas as to the nature of lands and conditions on which it was held and the various interests therein. In olden times land was practically the great species of property and was regarded with veneration and titles were of many different kinds. In England the right to inherit real estate was limited by what was called the law of "entail," that is the land descended to the oldest son to the exclusion of his brothers and sisters, if any. Land was tied up by providing for various interests therein dependent upon many conditions and possibilities, for example a certain person would be entitled to the use of the land for his life and then the property was to go to someone else, either to a limited extent or absolutely, or his title might depend upon the performance of some duty. In law the subjects of **"remainder," "reversion"** and the like are technical and not always easy to understand. **A remainder in an estate** is what is left after some other interest is determined, as where land is left to a person for life, remainder to another person; whereas

a **reversion** is where land is conveyed or devised to a person on a condition, and if that condition is or is not performed the title reverts to, or vests in, someone else.

In olden times, and at the present time for that matter, **the terms "lands," "tenements" and "hereditaments,"** are used in conveyances of lands and rights therein. The term **"land"** comprises the ground or earth, and includes not only the face of the earth but everything under or over it, and it may include the natural productions such as grow on the land, as trees, grass, or the natural products of the land, but not crops, and includes permanent structures erected on the land. Sometimes the word is defined by statute.

The word **"tenement,"** primarily denotes something that is held and includes rights in the land, or what is annexed to the land, and in its legal sense means an interest in land or some estate or interest connected therewith or growing out of it.

The term **"hereditament,"** includes both lands and tenements and generally everything that is capable of being inherited, the word meaning in its primary sense what may be inherited. There are two kinds of hereditaments, **"corporeal,"** such as permanent objects on the land, which may be inherited, and coal, stone, oil and gas on the land, or arising out of it, An **incorporeal hereditament** is a right issuing out of a thing, as for example, rent or the right to use property in a certain way, as for example passage over it which is called an **"easement."**

An absolute ownership of real estate is called a "fee." Real estate includes not only the surface of the earth, but whatever is under or over it and improvements of a permanent character placed upon it, such as buildings, fences, walls.

All rights in lands are regulated and governed by the law of the place where they are situated, whereas rights in personal property follow the person of the owner.

"Title" means the right whereby we hold either real or personal property, thus the title to land may be perfect, as where

a person owns it absolutely without any incumbrances or liens, or it may be qualified.

The method by which interests in lands are transferred is regulated by statutes; for example a statute may provide that an absolute title to land, or any interest therein, may be transferred only by an instrument in writing acknowledged, as it is expressed, before a notary public, or other officer authorized to take acknowledgments. An acknowledgment is simply an appearance of the party before such officer and making a declaration that the instrument is executed freely and the officer before whom such acknowledgment is made certifies accordingly under his official seal, whereupon the instrument is recorded in an office established by law for that purpose. A conveyance of land is called **"deed,"** or the property may be leased, as by a lease, or encumbered with a lien, as by a mortgage or deed of trust, and title to lands may be absolute, or be a qualified interest, as for example, the use of it for life; or the conveyance may be coupled with a condition that is the person to whom it is transferred may have the right to occupy and use it unless some condition imposed arises as for example, if a conveyance of land is made to a woman, or man, to be held by her or him until she or he is married.

Certain articles which were ordinarily wholly moveable and which may at the time even be disconnected with the land, may be regarded as real property, such as keys, locks upon doors, millstones in a mill or window blinds which may be detached from the house; hence **a class of articles known as "fixtures"** is regarded as real property. **A fixture is something of a permanent nature that is fitted, or actually applied, to a building and passes with it.** The old rule of common law was that whatever was affixed to the land became a part of it. It is not always easy to tell what is a fixture. Mere weight in an object does not make it a fixture, nor does the fastening of an article to the wall or floor to keep it steady, but wherever an article is calculated to form part of a building it is generally a fixture. The owner, or landlord, of the property may make an agreement with the tenant that the latter may put in cer-

tain articles and attach them to the building and that they may be removed when the tenancy ceases.

To become a fixture the article must not be merely laid upon the ground, it must be fastened or affixed to the buildings. Mantels in a house, locks on the doors, iron stoves in brick work are fixtures. In a house a furnace may or may not be a fixture, so also stoves, cupboards, gas fixtures, also may, or may not, be fixtures according to the agreement of the parties or the way they are attached to the building. Whatever is merely attached for temporary purposes will not ordinarily be a fixture.

As is often the case in regard to other matters, the law in regard to lands and interests therein is complicated and it is impossible to state all the principles applicable to the ownership of lands in any brief general statement.

CHAPTER XXXIV.

SALES.

A SALE is the transfer by the owner, in such case called the "seller," of property, or an interest therein, to another person, called the "buyer," for a price paid, or agreed to be paid, in money. A sale, or purchase, may be by an agent acting under authority given him to transact the business. In law there is a difference between a sale and an exchange of property, or barter, although in principle they are much the same thing. There may be an agreement to sell, as where the seller agrees to transfer the property for an agreed price after its manufacture or something has been done to it, or after a stated period of time.

In order to constitute a valid contract of sale it must first be made by parties competent to contract, and next there must be something to be sold either in existence, or to be acquired, or to be manufactured, and thirdly there must be a price agreed upon to be paid in money at the time, or at a future date, or in some cases where a sale is made without any price being fixed the law implies an agreement on the part of the buyer to pay the market price, or a reasonable price. To complete a contract of sale there must be what is called a **"meeting of the minds,"** that is the agreement must be mutual and complete. The buyer may make an offer, or the seller may make an offer, but in order to constitute a meeting of the minds there must be an unconditional acceptance of the proposal, or offer; or if some modification is suggested it amounts simply to a counter proposal, or new offer, and that must be accepted or agreed to.

In law the seller may give a proposed buyer an **"option"** to buy the property within a certain time and if this option is exercised within the time by the buyer, it will constitute a complete sale. In such case he is simply given **the privilege of buying** the property and such offer may be withdrawn at any time before it is accepted. If however one gives another at his request, and with his consent, an option to buy the property for a certain price within a certain time, this option

cannot be withdrawn, or cancelled, before the expiration of the time agreed upon.

In most every state it is provided by a statute, which is known as the "statute of frauds," that no contract for the sale of goods, wares or merchandise, for the price of thirty dollars, or upward, shall be held to be good unless the buyer shall accept part of the goods so sold, or actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain and signed by the parties to be charged with such contract, or their agents lawfully authorized. This statute is in force in practically all of the states, it was derived from an old English statute called "the statute of frauds and perjuries."

The effect of this statute is that no verbal contract for the sale of goods or merchandise which is required by the statute to be in writing, or where earnest money is not paid, can be enforced by suit, but its performance is optional with the party making the agreement.

Fraud, or imposition, or misrepresentation, on the part of the seller will make the sale liable to be set aside on the application of the party deceived, but there is a maxim of law to the effect that the buyer must beware because of the tendency of a seller to exaggerate the value of his goods. **A sale may be made by warranty,** that is the seller may warrant certain qualities, or condition of the articles sold. **Sometimes the law implies a warranty,** as that the seller has a good title to the goods. **There is an implied warranty** in the sale of notes, bonds, or other securities, that they are genuine, **but in the sale of goods there is no implied warranty of quality or soundness, or that they are fit for any particular purpose.** When an article is sold without the buyer seeing it the law implies that it will be as represented or be up to sample. There are many fine distinctions as to the kind of representations a seller may safely make, or upon which the buyer may safely rely.

The law has never given a definition of fraud, but each particular case is determined according to the facts shown. A seller guilty of deceit, or misrepresentation, may be liable

if the buyer has either relied on such representations, or has been deceived thereby. This is particularly so as to defects which cannot be readily noticed. A buyer cannot rely upon representations made by the seller, even though they prove false, if he has at hand means of ascertaining whether such representations are true, and does not investigate, because he can easily satisfy himself as to the truth of such representations, or he may require an express warranty. An exception to this rule is where the buyer reposes special trust in the seller because of confidential relations, such as the relation of attorney and client.

To complete a sale there must be delivery of the goods, or an offer to deliver them. If no place is designated for the delivery, the delivery is generally to be made at the place where the goods are at the time of the sale. If a delivery is to be made by a carrier, they must be delivered at the freight station of such carrier nearest the place where the goods are sold. Sales of merchandise are sometimes made f. o. b., which means delivered on board the cars for transportation. If any special agreement is made either as to the condition, identity or quality of goods when they are not exhibited to the buyer, such buyer is not obliged to accept them unless they comply with such condition or quality. In case the goods are not up to sample, or not as represented, the buyer must return them, or offer to do so within a reasonable time under the circumstances, or he will be deemed to ratify the transaction.

Generally in a sale of goods, unless some future time of payment is agreed upon, payment must be made when the goods are delivered. The property in the goods sold will not pass without a delivery of the goods so far as third parties are concerned, although as between the parties themselves the sale may be good. The goods may be in the possession of a third party and the title will pass when an order is given on the third party to deliver such goods to the buyer and the price is paid.

A great many controversies have arisen where goods have

been consigned, or conditionally sold. It is often a question whether a transaction amounts to a consignment of goods to a factor, or agent, to be sold by him on commission, the title to the goods to remain in the consignor, or whether the transaction places the title to the goods in the consignee. In the same way questions are often raised in regard to the nature and effect of what are called **"conditional sales."** A conditional sale is where the title to the goods remains in the seller until payment of the price, but the buyer is entitled to the possession and use of the goods until default in payment. The law of conditional sales, is not very clear, it sometimes depends upon state statutes and legal advice should be taken if there is any doubt.

When a sale is made and the price paid, if the buyer leaves the goods in the custody of the seller, the latter will not be liable for the loss of such property unless he has failed to exercise reasonable care under the circumstances. For example, where a horse was sold to a party who paid the seller the agreed price but on request of the seller allowed him to retain the horse to take the vehicle back to the stable and the horse was to be delivered the following day to the buyer, and that night the horse was burned, the loss fell on the buyer, as the ownership of the animal had passed by the payment of the price and its acceptance, and the seller could be held liable only for such ordinary and usual care as the average man would take of his own property and the seller did care for the horse as he had been accustomed to do before the sale.

The seller of merchandise may exercise a right which is called "stoppage in transitu," which is a resumption by such seller of the possession of goods not paid for while on their way to the vendee and before he has acquired actual possession of them. To exercise this right it must appear that the goods sold are unpaid for, either wholly or in part, and that the goods are still in transit, and that the buyer is insolvent. This right may be exercised not only by the seller himself, but also by persons occupying practically the same position,

as by a consignor who has purchased the goods. In every case where it is desired to exercise this right legal advice should be taken.

The law of sales is somewhat complicated, not as applied to the ordinary and usual transactions of business men, but where the exact facts are in doubt. It is not possible to here state all the principles with their modifications governing the law of sales, but we have given most of the elementary rules governing the subject. Probably every state has statutes which apply to all sales, whether absolute or conditional; they are not uniform but differ, especially in regard to conditional sales.

CHAPTER XXXV.

SURETIES.

IT is common for one person to become responsible for the failure of another to perform some obligation, or for the debts of another. The person for whom this obligation is incurred is called the **"principal,"** while the person assuming the obligation under certain conditions is the **"surety."** One person may make himself liable for the failure of another to perform any duty or meet any obligation, as by indorsing a note in which case he is an **"indorser,"** or he may guarantee the performance of a contract in which case he is a **"guarantor,"** or he may make himself liable by express contract for the payment of the debt, or for any kind of an obligation, of another.

In practically all the states it is provided by statute that no person shall be held for the debt or default of another unless the undertaking be evidenced by some writing signed by the party to be charged or his duly authorized agent. Therefore, as a general thing **a man may become surety for another only by entering into some written contract,** still he may incur an obligation **by assuming primary liability** as where he introduces a prospective buyer and tells the seller to charge the goods to him instead of to the buyer. This however is such a person's own primary obligation, but if he wishes to merely become surety that the buyer will pay for the goods he must sign some kind of writing.

It is a rule of law that if the principal is not bound by a contract because of fraud practiced by the person with whom it is made the surety is not liable; but the surety cannot complain of any fraud perpetrated on his principal if such principal does not complain, and although a person is induced to become surety by fraud of his principal in inducing the surety to make himself liable, he will not escape liability if the person to whom security is given is ignorant, or has no notice, of any such fraud. The agreement of a surety is not binding when the contract between the parties primarily liable is void because of illegality.

Any writing evidencing an intent on the part of one person to become surety for another creates an obligation on the part of such surety to make good any loss, or make any payment for which he has made himself liable, in case of default on the part of the principal. A party may become surety for another not only by furnishing the credit of his name but by depositing securities or goods to be held as security for the performance of the contract by the principal.

When the principal has performed his obligation, the liability of the surety ends; a surety is also discharged from liability if the creditor deprives him of any right he would have had against the principal, as for example, if a creditor could have collected a dividend from the bankrupt estate of his debtor but lost the right by delay, the surety would be entitled to the benefit of that dividend by way of reduction of his liability; or if the creditor by reasonable care could have collected his debt and afterwards because of an unreasonable delay the debtor becomes insolvent so that nothing can be collected from him the surety will be discharged. A surety can be discharged by a special release. A surety may be discharged by the creditor extending the time of payment fixed by the contract without the consent of such surety. A surety may be discharged by an act of fraud practiced upon him by the creditor, as by inducing him to give up securities held by him by the statement that the debt is paid. The surety on a contractor's bond is discharged if any modification be made in the contract for the erection of a building without the consent of the surety. And so the indorser on a note is released if the payee of the note after its maturity, or protest, gives the maker an extension of time for payment without the consent of such indorser, because the act indicates an intent of the creditor to rely on the credit of the maker of the note and not on that of the indorser. The surety on a bond may be released by a failure to give notice of some default, or by noncompliance with some condition, according to the terms of such undertaking.

At the present time the business of becoming surety on

bonds or other undertakings is carried on by corporations organized for that purpose. They issue contracts, or policies, which contain many provisos, limitations and conditions for notice and that certain things shall or shall not be done by the principal, and non-compliance with any one of these conditions may prevent recovery in case of loss.

CHAPTER XXXVI.

TRUSTS.

As here used the word "trust" does not mean a combination of corporations or individuals to monopolize a certain line of business or manufacture, but something very different.

Frequently real or personal property is conveyed, or transferred, to a person, or corporation, because of confidence reposed in him, or it, in order that the property so conveyed, or transferred, shall be managed and the income applied, or the property disposed of, according to the directions of the party making such conveyance, or transfer. **A holding of property, without owning it, subject to the duty of employing it, or applying its proceeds according to the directions given by the person from whom it is derived, is called a "trust."** The party holding such property in confidence, or for specified uses, is called a **"trustee;"** the party conveying, or transferring, the property to the trustee is variously called **"trustor," "donor," "creator,"** or **"founder;"** the person for whose benefit property is so given is called the **"cestui que trust,"** or **"beneficiary."** This interest may be created either by a writing, such as a deed, or contract, or by last will and testament.

When a writing conveys property and defines the uses to which it is to be put, it is called an "express trust." Sometimes the law implies a trust, where from the nature of the transaction it must be inferred that a party in possession is not entitled to the ownership of the property, but really holds it for the benefit of the person entitled to either the benefit, or possession, of it, as where the purchase price of land is paid by one party but the deed is made to another party, in which case there is **an implied trust,** or inference, that the person in whom the title is placed holds it for the benefit of the person who has paid the price. **Often there is what is called a "resulting trust,"** which is presumed to exist from the supposed intention of the parties and the nature of the transaction. Where a man buys property with the money of another he will

be considered a trustee for the one whose money has been used. The distinction between implied, resulting and constructive trusts is not always altogether clear. Statutes exist in most states defining and limiting trusts.

A trust may be what is called "passive," that is where the trustee is a mere depository of the property without any duty to perform in regard to it, or "**active,**"where the trustee is to hold and manage the property and dispose of either it or the income in a certain way. A trust may be either **"public,"** as where property is conveyed to trustees for the founding of a hospital, or college, or it may be **"private"** where property is placed in the hands of a trustee to manage it and pay over the income to certain individual parties, or do something else in regard to it.

Under the law an express trust must be created by an instrument in writing and the creator of the trust must be a person competent to make a contract, or make a will. The beneficiary of a trust may be any person, as an infant, or insane person, but under statutes of various states limitations are placed upon the power to create a trust so far as its duration or extent are concerned. For example, **a trust cannot be created so as to create a perpetuity** as it is called, but its continuance must be limited in extent of time; that is property may be conveyed in trust so as to give living parties the benefit of it during life and generally for thirty years thereafter. This rule as to perpetuities does not apply where the beneficiary of a trust is a charity or a school. The law provides that no one can convey property to a trustee for his own use in fraud of his creditors. Any kind of property may be the subject of a trust. Sometimes what is called a **"spendthrift trust"** is created, as where the beneficiary is improvident and the trustee is directed to pay over only the income without power of anticipation. Trusts in land especially must be created by deed or will and many states limit their conditions and duration as well as methods of creation.

It is not necessary that the creator of a trust constitute a third person trustee and transfer the property to him, but

one may constitute himself a trustee by making a declaration in writing that he holds the property in trust for the benefit of certain parties, or for certain purposes. The court will scrutinize all such transactions in order to prevent any fraud on creditors. Usually there must be a transfer not only of title, but a delivery, in the case of lands by passing the deed and having its recorded, or in the case of personal property by actually giving possession of it to the trustee.

Nice distinctions sometimes arise in regard to the construction of trusts, as where by his last will a person devises his property in trust for some public use, as to found a college or school, or charitable institution and the provisions are indefinite. The deed or will must with reasonable certainty specify the objects and purposes of the trust and the duties of the trustee as to the management and disposition of the property, or its income. Sometimes when the object of a charitable trust has failed, the court will direct the trustee to apply the income to some kindred purpose, or, upon the failure of the objects of a trust, the property may revert to the heirs of the creator of the trust. Trusts of land are governed by the laws of the state where the land is situated, but as to personal property by the law of the state where the trust is created. A trust may be part valid and part invalid. A **trust cannot be created for an illegal purpose.**

An express trust, in the absence of a provision reserving a power of revocation, cannot be revoked without the consent of the beneficiary. A trust however may be ended by failure of the objects for which it is created. In case of a breach of duty on the part of the trustee the court will remove him and appoint a new trustee. Courts of equity have supervision over all trusts and trustees and under certain circumstances, as where its purpose has failed, may terminate a trust or in case of ambiguity in the instrument creating the trust will give directions to the trustee as to its management, or construe it and declare its meaning. A trust will not fail because of the death of a trustee, or his refusal to act, but in that case the court will appoint a new trustee. If a trust is created but no trustee appointed the court will appoint one.

As a general rule anyone capable of holding real or personal property can be a trustee. Of late years laws have been enacted for the organization of corporations with power to execute trusts of all kinds, and such trust companies exist in all the states and their business is constantly increasing. Such a corporation may be a trustee. Under some circumstances a married woman or a minor may be a trustee. Executors and administrators may from the nature of things become trustees, especially an executor under the provisions of a will.

A trustee is not bound to accept the trust but if he does accept it he must discharge the duties connected with it to the best of his ability. If required by the beneficiary of the trust, or by the creator, or directed by a court, he must give bond for the faithful performance of his duties. A trustee if he once accepts cannot discharge himself from liability by resigning, but he may by decree of a court having jurisdiction be relieved of his trust and a new trustee will be appointed and upon making a settlement of his accounts the old trustee will be discharged.

The powers and duties of a trustee are usually derived from the instrument, such as a will or deed, creating the trust, but certain **duties are implied by law** from the very nature of the transaction. If a trustee accepts the trust he is bound to execute it; he must exercise that care and diligence which an ordinarily prudent man would exercise in the management of his own affairs. A court will not hold him responsible for mere mistakes or errors of judgment, or losses not caused by any lack of fidelity or failure on his part to exercise reasonable care. A trustee cannot derive any individual advantage or profit out of his trust, or act in any antagonistic capacity, but is bound to exercise the utmost good faith. A trustee can deal with a beneficiary of the trust if he acts with the utmost fairness, but all such dealings are looked upon with suspicion. If two or more trustees are appointed, they must act jointly.

A trustee has a right to incur and pay, and be reimbursed for all reasonable necessary expenses in the administration of

the trust, and where it is not charitable in its nature is entitled to compensation for his services. Trustees of what is called an "eleemosynary" or "charitable" corporation, as a school, asylum or hospital, are not entitled to compensation and if one accepts such a trust he is supposed to act from a sense of duty.

It is the duty of a trustee to keep accurate accounts of his receipts and disbursements on account of the trust; to make a settlement of his accounts as required by the instrument creating it to the beneficiary, or as required by the court. Usually a trustee can apply to the court for directions as to the administration of his trust and he may apply to the court to have his accounts settled. On the termination of a trust he must account for money in his hands undisposed of. This accounting is sometimes made to the beneficiary of the trust, or it may be made as directed by the court.

A trustee must keep all money and property of the trust separate and apart from his own.

CHAPTER XXXVII.

WILLS.

THE law recognizes the right of the owner of property to direct how it shall be disposed of after his death, and name a person, or persons, who shall carry out such directions. The writing containing such directions is called a "will," or last "will and testament." Statutes exist in all the states in regard to wills, and are very similar in their provisions. They specify the persons who may make a will, how it shall be executed and how established, or proved, and under what supervision its provisions may be carried out, and also make limitations upon the provisions of a will or powers conferred by it. **An addition to a will is called a "codicil,"** and is considered part of the original will, and must be executed in the same manner. It should refer to the original will.

The word **"devise"** is used in regard to a gift of real property and **"bequest"** is a gift of personal estate. The gift of personal property is called a **"legacy"** and the person to whom it is given is a **"legatee."** The party to whom a gift of real estate is made is called a **"devisee." A will is sometimes called a "testament" and the person making the will, if a man, is called a "testator," and if a woman, a "testatrix."**

Although a will is required to be in writing, yet the law recognizes in special cases, mentioned in the statute, what is called a **"nuncupative", or oral, will** which consist of directions given orally by a dying person, usually a soldier or sailor, for the disposition of a limited amount of personal property not exceeding a certain amount, generally one or two hundred dollars. In the case of a nuncupative will the statute usually requires that proof of it be made within a limited period after the death of the person making it, as for instance six months, and that the substance of the will must be reduced to writing within thirty days after the testamentary words are spoken.

In some states a will entirely in the handwriting of the testator, called an **olograph will,** although not witnessed is valid.

Every person of sound mind who has attained majority can make a will of all his property, and in some states a male person over the age of eighteen can make a will of personal property. A woman of sound mind, whether married or unmarried, can generally make a will if she has reached the age of majority, but no will, by either that of man or woman, can cut out the rights of the wife, or husband, such as dower or estate by the curtesy, which are conferred by statute. He or she in such case can repudiate the will and take what the law gives.

Every will must be in writing signed by the testator or by some person by his direction and in his presence, and must be **attested by at least two, or sometimes three, competent witnesses,** subscribing their names to the will in the presence of each other and the testator. The testator must sign his name also in the presence of the witnesses and each of the witnesses in the presence of each other. Some states require three witnesses and some states require the witnesses to add to their signatures their respective places of business. In a few states a will wholly in the handwriting of the testator is valid without witnesses and even when not signed if the testator states his name in the beginning.

A will can only be revoked by a subsequent will in writing, or by burning, cancellation, tearing, or obliterating, the same by the testator, or in his presence by his consent and direction. Sometimes it happens that a testator will make alterations in a will by writing them in it, but such alterations will not be of any avail, because not executed in the presence of witnesses as the original will but the will can be proved in its original form. If alterations are made in a will it must be re-executed.

A will executed by an unmarried woman is generally deemed revoked by a subsequent marriage, and if an unmarried man makes a will disposing of his whole estate and afterwards dies leaving issue by such marriage living at the time of his death, or born after his death, such will will be deemed revoked unless provision shall have been made for such issue

by some settlement or provided for in the will. The widow in such case can take the same as if there was no will if she wishes. It is a general rule also that if after the making of a will other children are born, or if a will be made not providing for or mentioning the children, the maker of the will is deemed to have died intestate as to the children not named in the will, or born subsequent to the making of the will, if no provision is made for them in the will. It is also a rule that if a child is dead when the will is made leaving descendants and no mention of them, or provision for them, is made in the will the testator dies intestate as to such descendants.

Under the law a legatee, or devisee, in a will cannot be a subscribing witness, but if he does sign the will as a witness the will is not thereby made void, but the devise or legacy to such attesting witness is void. If such witness would be entitled as heir to any share of the testator's estate, the share that would have gone to him by law will in some states be saved to him if it does not exceed the value of the devise or bequest made in the will. If the will is attested by a sufficient number of competent witnesses, excluding the witness who was a legatee or devisee, then such devise, or legacy, will be valid.

A will can only be made by a person of sound mind. Although the testator's mind may have become weakened by sickness or old age, still he has sufficient legal capacity to make a will if he has sufficient mind to know what property he has, who the persons are who have a moral claim for his consideration, and can understand how he is disposing of such property. Even a person of unsound mind can make a will in a lucid interval. The law regards anyone of sound mind if he has sufficient mind and memory to intelligently understand that he is making a will, and understands and is able to direct how he wants his property disposed of in case of his death. Even a dumb or blind person may make a will. Mere eccentricity, or delusions, will not impair the validity of a will, provided the delusion does not affect a particular disposal of the property, as for example, if a man should recite in his will that

he does not leave his son John any of his property because John has been guilty of certain conduct, when in fact the testator is under a delusion as to such conduct and the son in reality has not been guilty of the acts charged against him, the will will be invalid as to such son.

The law provides how wills may be proved or established in the court of proper jurisdiction, as for instance, a probate, or surrogate's court, and also provides for the granting of letters testamentary on the will, the duties of the executor, and how a will which has been established may be set aside or contested.

Any words in a will manifesting an intent to dispose of property in a certain way will be held sufficient. In construing a will the court always looks for the intent of the testator and it is best in drafting a will to endeavor to state the wishes of the testator by using his very words. The wills of many learned lawyers have been set aside because of uncertainty in their expressions, or invalidity in other respects. Many very simple wills, drawn by those who were not lawyers, have been sustained and held to be sufficient, while others of great length, prepared by capable lawyers, have proved defective.

A will should appoint a person to execute it, who, if a man, is called **"executor,"** or if a woman, **"executrix,"** and the will may provide that no bond shall be required from him; but if the will does not so provide letters testamentary will not be issued on the will without the furnishing of a bond by the executor. Moreover creditors may require an executor to give a bond even though it is not required by the will.

An executor may decline to serve, in which case the court will appoint a suitable person to execute it who is called **"administrator c. t. a."** which means **"administrator with the will annexed."**

Form of Will.

The following is a simple form of a will which may be used inserting after the first clause and before the appointment of

an executor, a clear statement in plain words of just what the testator wants to do with his property:

"I, John Smith, of the City of Chicago and State of Illinois, hereby declare this to be my last will.

I give to my wife, Emma Smith, all the property I may have at the time of my death, having confidence that she will adequately provide for any child or children we now have or that may hereafter be born to us.

I appoint my said wife Emma Smith executrix of this will without bond.

In Witness whereof, I have hereunto set my hand on this 10th day of June, 1912.

John Smith."

The attesting clause may be as follows, although in most states it is sufficient if the will is signed by two persons who add after their names the word "witnesses."

"In the presence of us and each of us, the above named testator, John Smith, signed the foregoing instrument and declared the same to be his last will, and in his presence and at his request and in the presence of each other we here sign our names as witnesses."

(For further information see the subject, Administration.)

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